

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

COMMENCED TERM FEB. 22ND 1881

No. 970 185

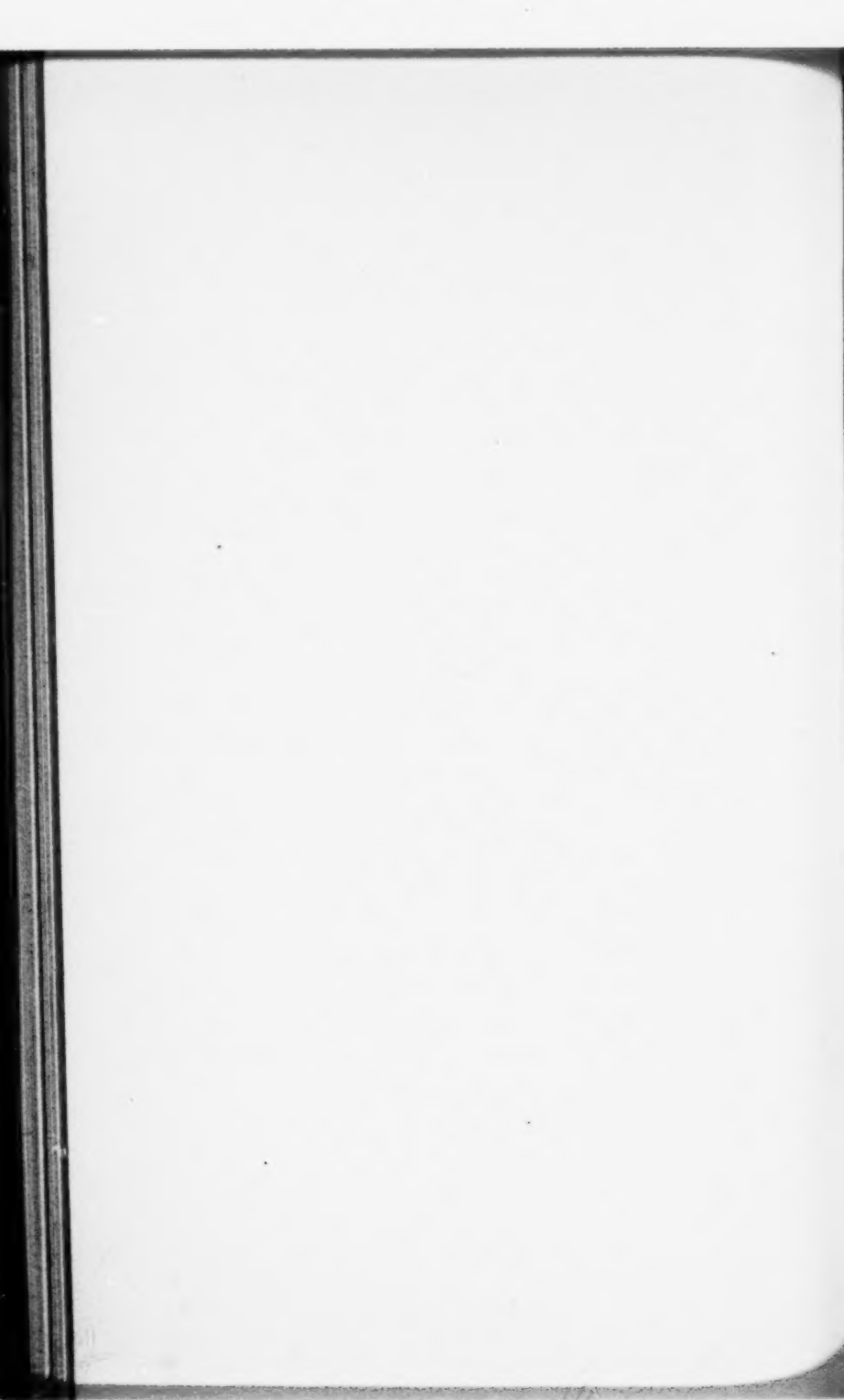
MISSOURI PACIFIC RAILWAY COMPANY, PLAINTIFF
IN ERROR.

VS.
J. D. LARABEE AND F. S. LARABEE, PARTNERS IN THE
FIRM UNDER THE STYLE AND FIRM NAME OF THE
LARABEE FLOUR MILL COMPANY.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSOURI.

FILED SEPTEMBER 4, 1881.

(12,954)



(22,954)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 878.

MISSOURI PACIFIC RAILWAY COMPANY, PLAINTIFF
IN ERROR,

vs.

F. D. LARABEE AND F. S. LARABEE, PARTNERS IN BUSI-
NESS UNDER THE STYLE AND FIRM-NAME OF THE
LARABEE FLOUR MILLS COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

INDEX.

	Original	Print
Caption	1	1
Syllabus by the court, filed December 8, 1906.....	2	1
Opinion, Burch, J., filed December 8, 1906	4	2
Statement as to proceedings, &c.....	14	12
Opinion of Supreme Court of United States by Brewer, J., January 11, 1909	15	13
Opinion of Holmes, J., concurring in judgment.....	23	19
Dissenting opinion of Moody, J.....	24	19
Statements as to proceedings, &c.....	27	21
Report of Commissioner H. C. Sluss.	32	21
Findings of fact.....	34	22
Conclusion of law.....	76	41
Stipulation as to exceptions.....	77	42
Exceptions of plaintiff.....	80	43
Additional findings requested by defendant.	81	44
Exceptions of defendant.....	83	44
Exceptions of defendant and motion to set aside report and findings of commissioner	89	47
Motion of plaintiff for final hearing.....	98	52
Exceptions of plaintiff.....	99	53

	Original	Print
Order setting cause for hearing, &c.....	101	5
Brief of plaintiff on report of commissioner, &c.....	103	5
Plaintiff's abstract of testimony relating to damages.....	132	6
Counter-abstract of defendant.....	189	9
Stipulation as to exceptions, &c.....	191	9
Alternative writ of mandamus.....	192	9
Findings of fact by Commissioner Sluss.....	196	9
Plaintiff's claim of damages.....	209	10
Schedule A—Statement of account.....	212	10
Bond of defendant.....	215	10
Amended statement and claim.....	217	10
Order appointing commissioner.....	223	10
Objections and exceptions to amended statement.....	224	10
Abstract of evidence.....	240	11
Testimony of F. D. Larabee.....	240	11
Frank S. Larabee.....	250	12
Joseph G. Waters.....	260	12
Edward D. McKeever.....	263	12
J. F. Switzer.....	266	13
J. J. Schenck.....	267	13
A. B. Quinton.....	267	13
F. S. Larabee.....	270	13
F. D. Larabee.....	270	13
J. G. Waters.....	275	13
John F. Switzer.....	299	14
Charles Blood Smith.....	301	14
A. M. Jackson.....	306	15
A. M. Harvey.....	313	15
E. S. Quinton.....	314	15
Lee Monroe.....	315	15
Matt G. Campbell <i>et al.</i>	333	16
F. D. Stevens.....	339	16
C. W. Binkley.....	379	18
F. S. Larabee.....	382	19
Index to abstract.....	390	19
Statement, briefs and supplemental abstract of defendant.....	391	19
Order of submission.....	523	26
Syllabus by the court, July 7, 1911.....	525	26
Opinion, Porter, J., July 7, 1911.....	527	27
Dissenting opinion, Benson, J.....	536	27
Motion for new trial.....	538	27
Petition for rehearing.....	541	28
Judgment.....	582	29
Clerk's certificate.....	583	29
Petition for writ of error.....	585	29
Order allowing writ of error.....	587	30
Assignment of errors.....	589	30
Order allowing writ of error and supersedeas.....	594	30
Writ of error.....	596	30
Citation and service.....	599	30
Supersedeas bond.....	601	30
Certificate as to lodgment.....	602	30
Return to writ of error.....	603	30

1 In the Supreme Court of the State of Kansas.

No. (15167).

THE LARABEE FLOUR MILLS Co., Plaintiff,

v.

THE MISSOURI PACIFIC RAILWAY Co., Defendant.

Be it remembered, That on the 8th day of December, A. D. 1906, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, the court's written opinion in the above entitled case, awarding a peremptory writ of Mandamus to the plaintiff and against the defendant therein, which opinion is in the words and figures as follows to-wit:

2 In Banc, November, 1906.

No. 15167.

THE LARABEE FLOUR MILLS COMPANY

v.

THE MISSOURI PACIFIC RAILWAY COMPANY.
Original Proceeding in Mandamus.

Writ Allowed.

Syllabus by the Court.

BURCH, J.:

1. Under the facts of this case it is held that a railway company holding itself out to the public as ready, and as undertaking, to do switching which requires it to leave its own rails and right of way, and go upon the rails and right of way of another company with which it has no express contract relating either to compensation for switching or to track rights, is a common carrier and as such must switch cars without discrimination against a disfavored shipper.

2. If the switching service described be wrongfully discontinued as to a single shipper he is entitled to a writ of mandamus to compel the carrier to resume it.

3. A common carrier of the kind described has no right to discontinue switching cars for a shipper on account of his refusal to pay bills for car service when the detention for which the charges were assessed was occasioned as much by the fault of the carrier as by the fault of the shipper.

4. A rule or order obliging a shipper to pay car service charges whether just or unjust, with no redress but to submit a claim for the return of his money to the manager of the car service association promulgating the requirement, is not reasonable.

3 5. The internal movement of property is not freed from state control until after it has been finally released by the consignor to a carrier for transportation to a destination fixed beyond the state line; and under the facts of this case such control is not lost until after the freight has been billed to its destination.

6. The switching of cars, loaded with freight afterwards transported to another state, which is purely local, which is independently contracted for, which has no relation to the contract of carriage under which the freight is removed beyond the border of the state, which has no relation to the ultimate destination of the cars, and which begins and ends before the destination of any car handled is fixed, is a mere preliminary incident to interstate commerce and subject to state control.

7. Under the facts of this case it is held that the writ of mandamus may issue notwithstanding the remedy afforded by proceedings before the board of railroad commissioners.

4 The opinion of the court was delivered by

BURCH, J.:

The plaintiff asks that a writ of mandamus be issued to compel the defendant to perform certain of its duties as a common carrier. The facts as found by a commissioner appointed to take the testimony and report findings of fact are as follows:

“First.

“In the succeeding findings The Missouri Pacific Railway Company will be referred to as ‘The Missouri Pacific’: the Atchison, Topeka and Santa Fe Railway Company as ‘The Santa Fe’: the Missouri Valley Car Service and Storage Association as ‘The Car Service Association’; and the plaintiff as ‘The Mill Company.’

“Second.

“Stafford is a flourishing town of 1600 people in Stafford County, Kansas, surrounded by a large scope of country productive of large annual crops of wheat. The Missouri Pacific and the Santa Fe each have a line of railroad running practically east and west through Stafford, with freight and passenger stations and side tracks and station facilities thereat.

“The Mill Company has, and for more than four years has had, a flouring Mill of one thousand barrels daily capacity, and continuously operates this mill except on Sundays. This mill is located along side the tracks of the Missouri Pacific and a short distance from its freight station. The tracks and freight stations of the two roads are separate a distance of one mile, and the Santa Fe station and station facilities are one mile from the mill. The Mill Company ships from its mill over these two roads substantially its entire product, three fifths of which is so shipped out of the State of Kansas and into other states, and two fifths to points within the state of Kansas. The Mill Company purchases a large portion of its grain at Stafford,

which is delivered in wagons at the mill; and purchases a large portion of its grain at points distant from Stafford, all of which is shipped to it in carload lots over these two roads, and delivered to it at the mill by the Missouri Pacific. The Mill Company sells its product to dealers, and the larger portion of its output is shipped to customers most conveniently reached by shipping from Stafford by the Santa Fe, and a large portion is shipped to customers most conveniently reached by shipping from Stafford by the Missouri Pacific.

"Third.

"The Missouri Valley Car Service and Storage Association, is an unincorporated voluntary association of a number of railroad companies, having a manager and other employees. The object and the duty of this Association is to represent, serve, protect the interest, and enforce the rights of the members thereof in the matter of the interchange of freight cars, the prompt loading, unloading, and return of cars interchanged, or delivered to shippers, for traffic purposes.

"This Association has been in operation for many years, and from a time prior to any of the transactions mentioned in this investigation, and its objects and operations and methods have been generally understood by commercial shippers by car load lots, and generally acquiesced in as a proper instrument for securing to the shipping public the greatest amount of service from the available car supply of the roads composing it. The Association has adopted and had in effect since January 1, 1904, a body of rules, a printed copy of which accompanies these findings.

"Fourth.

"The lines of the Missouri Pacific and the Santa Fe intersect at a point one mile distant westwardly from the mill and the Missouri Pacific station, and the same distance from the Santa Fe station. As near as practicable to the intersection the Santa Fe in the year 1903 constructed at its own expense a transfer track from a connection with its own to a connection with the Missouri Pacific line. At that point and for a half mile eastward the Missouri Pacific line is located in Prairie Avenue, a public street of Stafford, and no part of the transfer track is owned by the Missouri Pacific, or on its right of way or private ground. No express contract is shown to exist between the two railroad companies requiring either to use, or to permit the other to use the transfer track, or requiring either to place empty or loaded cars thereon to be taken away or returned by the other. In order for the Missouri Pacific to take cars from the said transfer track which had been placed thereon by the Santa Fe, or return such cars thereto, it is necessary for it to go entirely off its own track and right of way both in going after cars standing on said Santa Fe transfer track, and in setting loaded cars on the same; the Missouri Pacific not owning and having no control over any part of the said track or of the right of way over which it passes.

"Fifth.

"Immediately after the construction of the transfer track the Santa Fe began to place thereon empty cars to be by the Missouri Pacific taken therefrom and placed for loading with flour at the Mill Company's Mill, or at such convenient position as to enable the Mill Company with its own force to place them at the mill for such loading. At the same time the Missouri Pacific began to take such empty cars from the transfer track and place them for loading with flour at the mill, or in such position as to enable the Mill Company with its own force to place them at the mill for such loading; and on notice that such cars were loaded ready for shipment, to return them to the transfer track to be taken possession of by the Santa Fe. The practice in this matter was, when the Mill Company desired to ship flour from its mill by the Santa Fe it placed its order with the Santa Fe for the number of cars desired; the latter would place the cars on the transfer track; the Missouri Pacific would then place them at the mill and when the cars were loaded, return them to the transfer track, charge the Santa Fe two dollars per car for the service, notifying it of the switching; The Santa Fe would take the cars, bill them to destination, collect all freight and pay the Missouri Pacific its switching charges. In no instance did the Missouri Pacific issue Bill of Lading, way bill, or receipt, or present or collect bills for freight or switching charges.

"Sixth.

"When the Santa Fe received cars loaded with wheat consigned to the Mill Company, it placed them on the transfer track; the Missouri Pacific placed them at the mill; the Mill Company unloaded the wheat from them and reloaded them with flour, and the same practice was followed as in the case of empty cars brought in from the Santa Fe.

"Seventh.

"In making its application to the Santa Fe for cars, in no instance did the Mill Company make a deposit of any part of the freight, and in no instance was a deposit of any part of the freight demanded. In receiving orders for furnishing, transferring or returning cars as hereinbefore outlined, in no instance was any distinction made between cars intended to be used in carrying flour to points out of the state, and cars intended to carry to points within the state of Kansas.

"Eighth.

"The custom and practice described in the fifth and sixth paragraphs prevailed as to both empty and loaded cars from the time the transfer track was constructed uninterruptedly until Aug. 29, 1906; and prevails to the present time in favor of the Mill Company as to cars loaded with wheat consigned to the Mills Company; and still prevails in favor of all industries located on the Missouri Pacific at Stafford making shipments in or out over the Santa Fe in car load lots, except the Mill Company.

"Ninth.

"I find as a fact that the Santa Fe and the Missouri Pacific hold themselves out and undertake to place for loading on the Missouri Pacific tracks located on the Missouri Pacific line at Stafford, all cars furnished by the Santa Fe required for the shipment of freight in car load lots out over the Santa Fe; and also hold themselves out and undertake to likewise place all loaded cars consigned over the Santa Fe to industries located on the Missouri Pacific at Stafford.

"Tenth.

"From December 12, 1905, to April 26, 1906, fifty two cars taken empty from the transfer track by the Missouri Pacific and placed at or near the mill for loading, were detained after the expiration of forty eight hours from 7 A. M. of the day following their placing, before they were loaded by the Mill Company and ready to be returned to the transfer track. The total time of such detention was equivalent to the detention of one car eighty six days. The agent of the Missouri Pacific acting under the direction of the Car Service Association, which for this purpose represented both the Santa Fe and the Missouri Pacific, assessed against the Mill Company a car service or demurrage charge of one dollar per day for each day each of said cars was so detained after the expiration of free time, which assessment amounted to a total charge of Eighty six dollars.

"From July 24 to August 14, 1906, twenty nine cars loaded with wheat taken by the Missouri Pacific from the transfer track and placed at or near the mill to be unloaded and reloaded with flour, were detained after the expiration of the free time allowed, before they were reloaded and ready to be returned to the transfer track. The total time of such detention was equivalent to the detention of one car one hundred and four days.

"The agent of the Missouri Pacific acting as above, added to the free time to be allowed these cars to the extent of twenty six days, for the reason that the Missouri Pacific wholly failed to do any switching or placing of cars on July 26 when there were five cars, and on July 27 when there were six cars, and on July 30 when there were fifteen cars requiring switching and placing; and thereupon assessed against the Mill Company car service charges on account of such detention amount in the aggregate to Seventy eight dollars.

"Eleventh.

"After the car service charges on the loaded cars had been assessed, the Agent of the Missouri Pacific under instructions from the Car Service Association demanded of the Mill Company the payment of the whole of the car service charges assessed, both the eighty six dollars on account of empty and the seventy eight dollars on account of loaded cars. Thereupon the Mill Company offered to pay the eighty six dollars on account of the empty cars, and refused to pay seventy eight dollars on account of loaded cars, basing its refusal on the ground that the delay and detention of the cars was not caused by its fault, but was caused by the defective insufficient and inade-

quate service of the Missouri Pacific in placing the cars for unloading and reloading.

"The Agent of the Missouri Pacific under the instruction of the Car Service Association refused to accept the eighty six dollars or any sum less than the whole of the two amounts, and demanded the payment of the whole of the two amounts with the understanding that the Mill Company might present a claim for the return of any excess charges it claimed had been made, which claim would be investigated by the Car Service Association, and if it found excess or unjust charges had been assessed, the amount so found would be refunded to the Mill Company. The Mill Company still refused to comply with that demand.

"Twelfth.

7 "On August 29, 1906, and after the Mill Company had refused to make payment of the entire claim for car service charges, the Missouri Pacific by the direction of the Car Service Association ceased and refused to make further delivery to the Mill Company of empty cars placed on the transfer track for the use of the Mill Company by the Santa Fe, and still refuses to make such delivery. The only object and purpose of the Car Association in directing, and of the Missouri Pacific in the refusal to make such further and delivery of such empty cars to the Mill Company is to compel it to pay the whole of both amounts of car service charges under the understanding described in paragraph eleven by the enforcement of the rules of the car service association. The refusal to make such delivery was not based upon a claim that the compensation paid for the service was not satisfactory, nor upon a claim that any part of such service constituted a part of interstate commerce, nor upon a claim that the Missouri Pacific did not undertake to perform such service.

"Thirteenth.

"As a result of the refusal to make delivery of empty cars as described in paragraph twelve, the Mill Company when desiring to ship any of its products from Stafford by the Santa Fe is compelled to haul the same in wagons from its mill to the station of the Santa Fe and load into cars from wagons. This entails upon the Mill Company great inconvenience and great additional expense in the management of its business.

"Fourteenth.

"During the period covered by the car service charges on loaded cars constituting the seventy eight dollars so demanded, an unusual and heavy demand was being made upon the Missouri Pacific for the transportation to market of a newly harvested crop of wheat then ready for market, along that portion of its line from Conway Springs to Larned in Kansas. The freight service on that portion of its line was performed throughout the year — a single engine and train crew, passing from Conway to Larned and return. The trans-

fer and switching service performed by the Missouri Pacific heretofore described, was performed by this single engine and crew. Ordinarily and by the train schedule this engine and crew passed through Stafford and performed such transfer and switching service once in the early part and once in the latter part of each day except Sunday; and when so performed with reasonable promptness and regularity, this single engine and crew were capable of performing the service to the satisfaction of the Mill Company. The engine so used was old and frequently defective and out of repair. The single engine and crew were not sufficient or equal to meet the unusual demand of the business of that part of the line during the period mentioned, and perform the transfer and switching service in question with promptness or regularity.

"During the period mentioned the Mill Company made its applications from time to time to the Santa Fe for such number of cars in addition to the loaded cars consigned to it which it might reasonably anticipate would arrive at the same time, as it deemed necessary in its business, but not for a greater number of cars to be delivered at one time then, together with such loaded cars, it could load within the free time allowed if such empty and loaded cars were properly placed with reasonable promptness.

"Fifteenth.

"The crowded condition of the business on the Missouri Pacific during that period and the general character of its motive power and train crew were well known to its agent, as well also to the Santa Fe and to the Mill Company.

"When the Mill Company placed its applications for cars with the Santa Fe it could not certainly know the day on which they would be placed on the transfer track, or know with certainty on what day loaded cars consigned to it over the Santa Fe would arrive and be placed on the transfer track; or know that at such times such cars could not be properly placed by the Missouri Pacific with reasonable promptness and removed when reloaded with like promptness. The Missouri Pacific did not better or increase its motive power or train service to meet the increased and unusual demand of its business during the period mentioned.

"Sixteenth.

"I find as a fact that the detention of the loaded cars beyond the free time allowed, on account of which the disputed car service to the amount of seventy eight dollars was assessed against the Mill Company, was caused as much by the fault and defective motive power and insufficient train service of the Missouri Pacific, as from any fault or omission on the part of the Mill Company."

Section 2 of Rule IX. and section I of Rule X. of the Missouri Valley Car Service Association read as follows:

"SEC. 2. On deliveries to private sidings, should consignees or consignors refuse to pay or unnecessarily defer settlement of bills for car service, the agent will decline to switch cars to the private

sdings of such parties, notifying them that deliveries will only be made to them on the public delivery tracks of the company, after the payment of freight charges at his office. Agent will promptly notify Manager of action taken.

"SECTION 1. The Manager is authorized to entertain claims and refund car service charges in special cases. Claims should be made direct to the Manager, with paid car service bills attached, and each claim should carry with it a full statement of the grounds upon which reduction of the car service is requested."

These findings narrow the controversy to the matter of taking empty cars from the transfer track to plaintiff's mill and returning them when loaded.

It is argued that no contract exists between the defendant and the Santa Fe relating to the use of the transfer track and that the court cannot make one for them; that the defendant cannot be compelled to leave its own rails and its own right of way and go upon the rails and property of others to perform carriage services; and that the relief asked would indirectly require the defendant to devote a part of its main line to the use of the Santa Fe as a terminal. This argument does not reach the merits of the case. Under findings eighth and ninth the only question is if the plaintiff shall be given the same service afforded to other industries located at Stafford.

When the transfer track was built the defendant was under no obligation to do switching over it or from it either for the Santa Fe or for the shippers at Stafford. For the purpose of the discussion merely it may be conceded that it could not have been compelled to

9 do so; that it had the absolute right to restrict its business to the operation of its own line as it now restricts its service over the transfer track to the handling of freight cars. But it did not exercise its privilege. It voluntarily undertook to serve the public by switching cars just as it voluntarily undertook, in the beginning, to serve the public by operating its own road. It held itself out as a switching company and undertook to handle all cars loaded and empty which the shipping interests of Stafford required should pass over the transfer track, although compelled to leave its own track and right of way in order to do so. It relied upon the implied contract of the Santa Fe to pay the value of the service performed. The Santa Fe participated in this public profession and undertook to devote its property and resources to the proposed end. This conduct on the part of the two roads was in no respect *ultra vires*. It was in direct furtherance of the public purposes of their incorporation, and having held themselves out to the general public as ready and willing to render the service described they assumed all the duties which the law imposes in view of the nature of the business and the customs incident to it. The defendant became, and under the findings still is, a common carrier of loaded and empty freight cars to and from the transfer track and its own station a mile away. (*Missouri Pacific Railway Co. v. Grocery Co.*, 55 Kan. 525.)

It is hornbook law that a carrier cannot renounce as against some disfavored shipper the public duty which it assumed when it en-

gaged in the kind of transportation business which it offers to conduct. Being a common carrier for all, the defendant must switch all cars tendered for that purpose, including those intended for the mill company. It is equally elementary that a carrier may be compelled by mandamus to perform duties of this kind to an aggrieved shipper.

The findings of fact show that the plaintiff has not forfeited the right it claims. It is unnecessary to inquire if a carrier may discontinue all further service to a shipper on account of past infractions of reasonable rules adopted to secure better service to the public. Rule IX of the Car Service Association does not provide for the infliction of any such penalty but only requires that further deliveries shall be made on public delivery tracks and not at
10 private sidings. Rule X in its application to this case, and the special order issued for the purpose of coercing the plaintiff, are not reasonable. A shipper ought not to be compelled to pay an unjust charge for car service with no redress but to submit a claim for the return of his money to the manager of the association promulgating the rule or order. The weight of authority seems to be that the carrier has a lien for compensation for the use of cars beyond reasonable free time. If the lien be waived the courts are open. But the Car Service Association holds no franchise to compel the payment of claims of this kind, and then to decide for itself whether or not it will refund. And in any event a carrier cannot justly withhold its services when it is equally at fault in the matter of which it complains. (Finding Sixteenth.)

The defendant claims that an order restoring to the Mill Company the service it formerly received would regulate interstate commerce so far as cars destined to points outside the state are concerned.

It is plain that the taking of empty cars from the transfer track and placing them at the mill is nothing more than preparation for the act of interstate traffic which is to begin later. It needs a shipment of flour to initiate interstate commerce from the plaintiff's mill, and so long as the flour remains in the mill commerce has not begun. The mere purpose to use the cars in the future is not enough. They must be loaded with freight which is put in course of exportation before state control over them is suspended. (Norfolk & Western Ry. Co. v. Commonwealth, 93 Va. 749.)

After a car has been loaded and returned to the transfer track the Santa Fe may for lawful reasons decline to receive it. If it does receive it there is neither a consignee nor a destination for it until the Mill Company has given shipping directions. The preliminary stage has still not been passed. The movement from the point of origin necessary to interstate commerce not only has not begun, but may never begin. As remarked by Mr. Justice Bradley in the case of *Coe v. Errol*, 116 U. S. 517, 526, "Though intended for exportation they may never be exported; the owner has a perfect right to change his mind."

11 The custody of the carrier is not impressed with the change which frees the goods from domestic control until after they have been finally released to it by the consignor

for transportation to a destination fixed beyond the state line; and under the custom prevailing at Stafford this does not occur until the cars have been taken to the transfer track, received by the Santa Fe, and finally billed. In the case of *Coe v. Errol* already referred to it is said:

"It is true, it was said in the case of the *Daniel Ball*, 10 Wall. 557, 565: 'Whenever a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the States has commenced.' But this movement does not begin until the articles have been shipped or started for transportation from the one State to the other. The carrying of them in carts or other vehicles, or even floating them, to the depot where the journey is to commence is no part of that journey. That is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation. Until actually launched on its way to another State, or committed to a common carrier for transportation to such state, its destination is not fixed and certain. It may be sold or otherwise disposed of within the State, and never put in course of transportation out of the State. Carrying it from the farm, or the forest, to the depot, is only an interior movement of the property, entirely within the State for the purpose, it is true, but only for the purpose, of putting it into a course of exportation; it is no part of the exportation itself. Until shipped or started on its final journey out of the State its exportation is a matter altogether in fieri, and not at all a fixed and certain thing."

There is still another test which may be applied. The Missouri Pacific engine for all practical and legal purposes simply takes the place of the plaintiff's teams in moving flour from the mill to the Santa Fe. Its work is that of switching cars. The service is purely local. It is independently contracted for. It has no relation to the contract of carriage by virtue of which the freight is removed beyond the borders of the state. It has no relation to the ultimate destination of the cars handled. It begins and ends before the destination of any car is fixed, and is in fact nothing but a preliminary incident to the interstate journey. This being true it is subject to state control. (*Penn. R. R. Co. v. Knight*, 192 U. S. 21, and cases cited in the opinion.)

The facts in the case of *Chicago, M. & St. P. Ry. Co. v. Becker*, 32 Fed. 849, are in all essential respects analogous to those under consideration. The principles there applied are those which governed the decision of the Supreme Court of the United States in the *Knight* case. The opinion reads:

"The case presented is this: In order to afford facilities to shippers, the complainant has constructed short lines of road, or side tracks or switches, so called, from its yard or depot or main lines, running over and across the streets and highways to the various mills and manufacturing establishments in the city of Minneapolis; and its switches are so built as to enable it to take cars from the shippers at the mills and deliver them to other lines of railway, or deliver cars to consignees received by it from

other roads. When this service is performed, and the cars are to be transported from the city of Minneapolis over other roads, and when cars coming into that city over other roads are taken by the complainant over its own switches, and delivered to other roads or to consignees, a charge of one dollar and fifty cents per car is exacted for this switching service rendered, which is claimed to be reasonable and just; but if the cars are to be transported over its own line to the point of destination, or come into the city over complainant's main road, the service is free, and this separate and distinct charge, when made, is only for this local switching. This charge is not a part of the through rate fixed and determined beforehand, and has no reference to interstate shipment. The transportation of cars over the switches from the warehouses or mills to the depot, or from the depot to these mills, can be regulated in many respects by the commissioners, and the rate for performing the service fixed by virtue of the police power of the state, in the same manner as the carriage by dray per load or distance is established for the public good. And I see no difference in the principle to be applied in such cases, although, incidentally, they may be connected with interstate commerce. The service is local, and there is nothing upon the face of the order of the commissioners indicating that it is intended to regulate interstate commerce. Even if it is conceded that this carrying of freight over the switches is an act of interstate commerce, it does not necessarily follow that the order of the commission affecting this traffic is in violation of the constitution of the United States. It is not every act that affects such commerce that amounts to a regulation of it, and this order fixing the price per car for service rendered, and to which the order applies, is not related to the contract for carrying the freight outside the limits of the state of Minnesota, and is not a part of it."

The case of *Central Stock Yards Co. v. Louisville & N. R. Co.* 118 Fed. 113, 55 C. C. A. 63; 63 L. R. A. 213, is cited by the defendant. The State of Kentucky attempted to seize upon shipments of live stock in the course of transportation by the railroad company from a foreign state and compel their delivery to a connecting carrier in order that they might reach a particular stock yard, although the transporting company provided adequate facilities for the delivery and care of stock at another yard in the same city. Manifestly that was an effort to regulate interstate commerce.

The case of *McNeill v. Southern Railway Co.* 202 U. S. 543, also cited by the defendant, is of the same character. The state of North Carolina undertook to control the disposition of freight while in transit from a foreign state. The following extract from the opinion is sufficient to show the inapplicability of the decision to the facts under consideration.

"The cars of coal not having been delivered to the consignee, but remaining on the tracks of the railway company in the condition in which they had been originally brought into North Carolina from points outside of that State, it follows that the interstate transportation of the property had not been completed when the corporation commission made the order complained of. *Rhodes v. Iowa*, 170 U. S. 412."

The defendant insists finally that a writ of mandamus should not issue against it because the plaintiff has a plain and adequate remedy under section 4, chapter 340, Laws 1905, page 557, conferring certain power and authority upon the board of railroad commissioners.

It is not enough that a party have a plain and adequate remedy in order to deprive him of the right to the writ of mandamus. The remedy must also be one "in the ordinary course of the law." (Gen. Stats. 1901, Sec. 5185.)

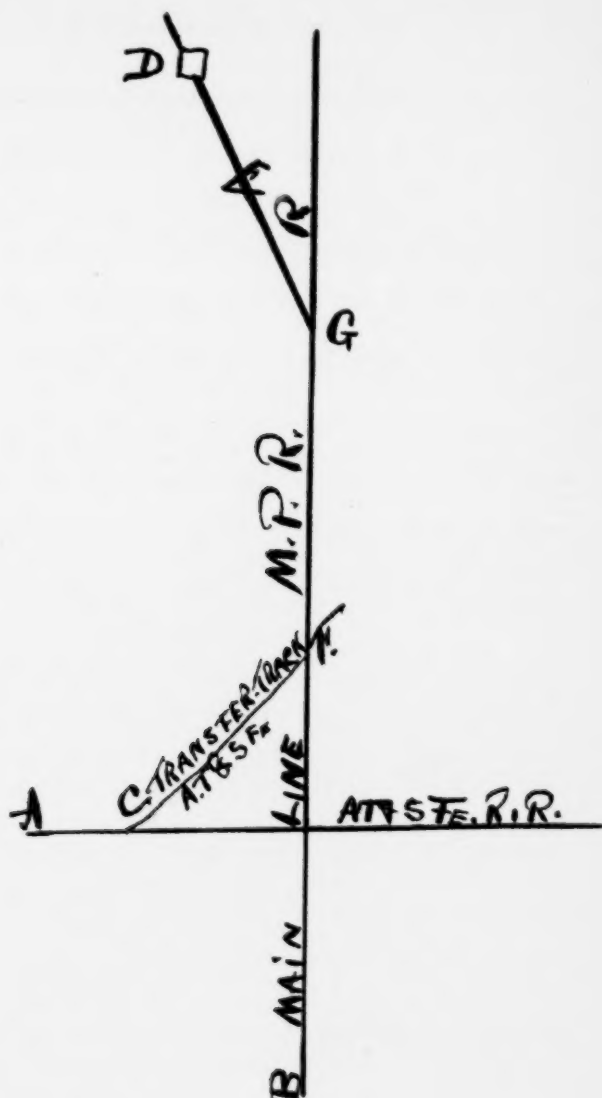
A proceeding before the board of railroad commissioners is sufficiently out of the ordinary course of the law to distinguish it. Its characteristic feature is that it takes a mandamus suit in this court to complete the remedy. Otherwise it might not be adequate. Hence there is no reason why, in a case involving a right not of statutory creation and not depending upon any statute for its enforcement, the complainant may not apply directly to this court for the desired relief.

The peremptory writ of mandamus may issue, with costs to the plaintiff.

The court has authority to render judgment in favor of the plaintiff for any damage it has sustained (Gen. Stats. 1901, Sec. 5193). The plaintiff is given ten days in which to file a claim for damages, stating separately the character and amount of each item. The defendant is given ten days after notice of the filing of the claim in which to except to any items which it may deem not recoverable. The court will then pass upon the exceptions if any be taken and make orders respecting a hearing.

Endorsed: No. 15167. The Larabee Flour Mills Company v. The Mo. Pac. Rly. Co. Syllabus and Opinion. Writ Allowed. Filed Dec. 8, 1906. D. A. Valentine, Clerk Supreme Court.

14 Be it further remembered, that afterward on the 24th day of December, 1906, a writ of error was granted by the Supreme Court of the United States to the Supreme Court of the state of Kansas, to review the judgment of the Supreme Court of the State of Kansas; that in due time a transcript of the record was transmitted to the Supreme Court of the United States and said above entitled case there remained pending until the 11th day of January, 1909, when the same was, by the consideration and judgment of said Court, affirmed, and the opinion in said cause rendered, and a mandate of the Supreme Court of the United States was duly transmitted to and filed with the Clerk of the Supreme Court of the State of Kansas and the order of affirmance of the judgment of said Supreme Court of the State of Kansas duly entered and the mandate spread of record, which opinion of the Supreme Court of the United States so rendered and which mandate so issued, are in the words and figures as follows, to-wit:



No. 878.
 M.P.R. Co.
 Saratuchel
 p. 16



MISSOURI PACIFIC RAILWAY COMPANY
v.
LARABEE FLOUR MILLS COMPANY.

No. 16.

Error to the Supreme Court of the State of Kansas.

Argued November 11, 12, 1908; Decided January 11, 1909.

No one can be compelled to engage in the business of a common carrier, but if he does so, he becomes subject to the duties imposed on common carriers.

Even in the absence of legislative enactment or special contract a common carrier is bound to treat all shippers alike and can be compelled to perform this common-law duty by mandamus or other proper writ.

Notwithstanding the creation of the Interstate Commerce Commission, and the delegation to it by Congress of the control of certain matters, a State may, in the absence of express action by Congress or by such commission, regulate for the benefit of its citizens local matters indirectly affecting interstate commerce.

Where there has been no action by Congress or the Interstate Commerce Commission a state court may by mandamus compel a railroad company doing interstate business to afford equal local switching service to its shippers, notwithstanding the cars in regard to which the service is claimed are eventually to be engaged in interstate commerce. *McNeill v. Southern Railway Co.*, 202 U. S., 543, distinguished.

On September 15, 1906, the Larabee Flour Mills Company (hereinafter called the mill company) filed its application in the Supreme Court of Kansas for an alternative writ of mandamus, compelling the Missouri Pacific Railway Company (hereinafter called the Missouri Pacific) to restore, resume and make transfer of cars between the lines of the Atchison, Topeka and Santa Fe Railway Company (hereinafter called the Santa Fe) and the mill and elevators of the plaintiff, situated in the town of Stafford. The following diagram shows the location of the mill and railroad tracks:

(Here follows diagram marked page 16.)

17 Line "A" represents the main line of the Santa Fe Railway Company; line "B" the main line of the Missouri Pacific Railway Company; line "C" the transfer track owned by the Santa Fe Company; "D" the mill of the Larabee company; "E" the spur track running from the main line of the Missouri Pacific Railway Company. The distance from "F" to "G" on the main line of the Missouri Pacific Railway Company is about one mile.

Upon the filing of this application and the answer and return of the Missouri Pacific the matter was referred to a commissioner, who reported his findings of fact, which, so far as are material to the questions presented, are as follows: Stafford is a flourishing town of 1,600 people, situated in the midst of a wheat-growing district of the State. The mill company has for more than four years been operating a flouring mill of 1,000 barrels daily capacity. About three-fifths of its product is shipped out of the State of Kansas into other states and the remaining two-fifths to points within the State. It receives a large portion of its grain in carload lots over the two roads.

The Missouri Valley Car Service and Storage Association (hereinafter called the car service association) is an unincorporated voluntary association of a number of railroad companies, having a manager and other employes. The object and the duty of this association is to represent and protect the interest and enforce the rights of the members thereof in the interchange of freight cars, the prompt loading, unloading and return of cars interchanged, or delivered to shippers, for traffic purposes. It had been in operation for many years, commencing prior to any of the transactions mentioned in this litigation. Its objects, operations and methods were generally understood by commercial shippers and acquiesced in as appropriate for securing to the shipping public the greatest amount of service over the roads composing it.

No express contract existed between the two railroad companies requiring either to use or to permit the other to use the transfer track, or requiring either to place empty or loaded cars hereon to be taken away or returned by the other. Whenever the Santa Fe placed its empty cars for the mill company on the transfer track, the Missouri Pacific, upon notice thereof, hauled and delivered them at the mill on the siding connecting it with the Missouri Pacific. The

18 Santa Fe and the Missouri Pacific both held themselves out as ready to do such and like transferring, and continued to do so after the controversy arose in this case for all industries located on the Missouri Pacific at Stafford, making carload shipments in or out over the Santa Fe, except the mill company. A controversy arose between the Missouri Pacific and the mill company as to two charges for demurrage; one for demurrage between December 12, 1905, and April 26, 1906, and the other between July 24 and August 14, 1906. Payment of both was demanded by the car service association. One of them, the mill company, offered to pay; the other it refused, on the ground that the delay and detention were not caused by its fault but by the defective, insufficient and inadequate service of the Missouri Pacific in placing the cars for unloading and reloading. For a failure to pay both these charges the Missouri

Pacific, by the direction of the car service association, ceased and refused to make further delivery to the mill company of empty cars placed on the transfer track for the use of the mill company by the Santa Fe, in consequence of which the mill company, when desiring to ship any of its products from Stafford by the Santa Fe, was compelled to haul the same in wagons from its mill to the station of the Santa Fe and there load into cars. This entailed upon the mill company great inconvenience and additional expense in the management of its business. The refusal of the Missouri Pacific was based solely upon the ground above stated, and not upon a claim that the compensation paid for the service was unsatisfactory, or that the service constituted a part of interstate commerce, or that the Missouri Pacific did not undertake to perform services of such character.

The commissioner also found that the detention of the cars on account of which the demurrage charge was refused payment by the mill company was caused as much by the defective motive power and insufficient train service of the Missouri Pacific as from any fault or omission on the part of the mill company.

The case coming on for hearing before the Supreme Court of the State a peremptory writ of mandamus was ordered, commanding the Missouri Pacific to immediately resume the transfer and return of cars loaded and unloaded from the line of the Santa Fe to and from the mill and elevator at the station and city of Stafford, upon the request and demand of the mill company, and upon payment of the theretofore customary charges.

19 Mr. Justice Brewer, after making the foregoing statement, delivered the opinion of the court.

All questions arising under the constitution and laws of the State of Kansas are settled adversely to the plaintiff in error by the decision of the Supreme Court of the State, *Merchants' Bank v. Pennsylvania*, 167 U. S. 461, and cases cited in the opinion. This brings within a narrow range the controversy which this court is called upon to decide.

Coming directly to that, counsel for plaintiff in error contend that no duty was imposed on the railroad company by act of the legislature or mandate of commission or other administrative board. Conceding this, it is also true that the Missouri Pacific was a common carrier, and as such was engaged in the work of transferring cars from the Santa Fe track to the mill company, and after this controversy arose continued like transfer for all industries located on the Missouri Pacific at Stafford, except the mill company. While no one can be compelled to engage in the business of a common carrier, yet when he does so certain duties are imposed which can be enforced by mandamus or other suitable remedy. The Missouri Pacific engaged in the business of transferring cars from the Santa Fe track to industries located at Stafford, and continued to do so for all parties except the mill company. So long as it engaged in such transfer it was bound to treat all industries at Stafford alike, and could not refuse to do for one that which it was doing for others. No legislative enactment, no special mandate from any commission, or other administrative board was necessary, for the duty arose from the fact

that it was a common carrier. This lies at the foundation of the law of common carriers. Whenever one engages in that business the obligation of equal service to all arises, and that obligation, irrespective of legislative action or special mandate, can be enforced by the courts. Neither is there any significance in the absence of a special contract between the Missouri Pacific and the mill company. It appears that the practice theretofore had been for the Missouri Pacific to charge the Santa Fe for the transfer, that the latter collected the total freight and paid the Missouri Pacific its switching charges. There is no suggestion that the amount of this charge was changed in favor of any other shipper, and so long as
20 that was so it was the charge which the Missouri Pacific was entitled to make for cars transferred at the instance of the mill company. If in the future a change is made in behalf of shippers generally, undoubtedly that change can be made operative in respect to the mill company. Indeed, all these questions are disposed of by one well established proposition, and that is that a party engaging in the business of a common carrier is bound to treat all shippers alike and can be compelled to do so by mandamus or other proper writ.

But the main contention on the part of the Missouri Pacific runs along an entirely different line. It is that the Missouri Pacific and the Santa Fe are common carriers, engaged in interstate commerce, and as such are subject to the control of Congress, and, therefore, in these respects not amenable to the power of the State. It appears from the findings that about three-fifths of the flour of the mill company is shipped out of the State, while the other two-fifths is shipped to points within the State. In addition, the hauling of the empty cars from the Santa Fe track to the mill was, if commerce at all, commerce within the State.

The roads are, therefore, engaged in both interstate commerce and that within the State. In the former they are subject to the regulation of Congress; in the latter to that of the State, and to enforce the proper relation between Congress and the State the full control of each over the commerce subject to its dominion must be preserved. *Fairbank v. United States*, 181 U. S. 283. How the separateness of control is to be accomplished it is unnecessary to determine. Its existence is recognized in the first section of the Interstate Commerce Act of February 4, 1887, c. 104, 24 Stat. 379, as well as in that of June 29, 1906, c. 3591, 34 Stat. 584, for each provides:

"That the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly within one State and not shipped to or from a foreign country from or to any State or Territory as aforesaid."

This case does not rest upon any distinction between interstate commerce and that wholly within the State. It is the contention of counsel for the mill company that it comes within the oft-repeated rule that the State, in the absence of express action by Congress, may regulate many matters which indirectly affect interstate com-

merce, but which are for the comfort and convenience of its citizens.

21 Of the existence of such a rule there can be no question. It is settled and illustrated by many cases.

Thus in *Cooley v. Board of Wardens of Port of Philadelphia*, 12 How. 299, it was held that a regulation of pilots and pilotage was a regulation of commerce within the grant of the power to Congress, but further that (p. 319):

"The mere grant of such a power to Congress did not imply a prohibition on the States to exercise the same power; that it is not the mere existence of such a power, but its exercise by Congress, which may be incompatible with the exercise of the same power by the States, and that the States may legislate in the absence of Congressional regulations. *Sturges v. Crowninshield*, 4 Wheat. 193, *Houston v. Moore*, 5 Wheat. 1; *Wilson v. Blackbird Creek Company*, 2 Pet. 251."

In *Cleveland, &c., Ry. Co. v. Illinois*, 177 U. S. 514, is a collection by Mr. Justice Brown, speaking for this court, of a number of these cases. We quote from the opinion (pp. 516-517):

"Few classes of cases have become more common of recent years than those wherein the police power of the State over the vehicles of interstate commerce has been drawn in question. That such power exists and will be enforced, notwithstanding the constitutional authority of Congress to regulate such commerce, is evident from the large number of cases in which we have sustained the validity of local laws designed to secure the safety and comfort of passengers, employes, persons crossing railway tracks, and adjacent property owners, as well as other regulations intended for the public good.

"We have recently applied this doctrine to state laws requiring locomotive engineers to be examined and licensed by the state authorities (*Smith v. Alabama*, 124 U. S. 465); requiring such engineers to be examined from time to time with respect to their ability to distinguish colors (*Nashville, &c., Railway v. Alabama*, 128 U. S. 96); requiring telegraph companies to receive dispatches and to transmit and deliver them with due diligence, as applied to messages from outside the State (*Western Union Tel. Co. v. James*, 162 U. S. 650); forbidding the running of freight trains on Sunday (*Hennington v. Georgia*, 163 U. S. 299); requiring railway companies to fix their rates annually for the transportation of passengers and freight, and also requiring them to post a printed copy of such rates at all their stations (*Railway Company v. Fuller*, 17 Wall. 560); forbidding the consolidation of parallel or competing lines of railway (*Louisville & Nashville R. R. v. Kentucky*, 161 U. S. 677); regulating the heating of passenger cars, and directing guards and guard posts to be placed on railroad bridges and trestles and the approaches thereto (*N. Y., N. H., &c., R. R. v. New York*, 165 U. S. 628); providing that no contract shall exempt any railroad corporation from the liability of a common carrier or a carrier of passengers, which would have existed if no contract had been made (*Chicago, Milwaukee, &c., Ry. v. Solan*, 169 U. S. 133); and declaring that when a common carrier accepts

for transportation anything directed to a point of destination beyond the terminus of his own line or route, he shall be deemed thereby to assume an obligation for its safe carriage to such point of destination, unless at the time of such acceptance such carrier be released or exempted from such liability by contract in writing signed by the owner or his agent (*Richmond & Allegheny Railroad v. Patterson Tobacco Company*, 169 U. S. 311). In none of these cases was it thought that the regulations were unreasonable or operated in any just sense as a restriction upon interstate commerce."

See also *Missouri, Kansas & Texas Railway v. Haber*, 169 U. S. 613, 626; *Wisconsin, &c., Railroad Company v. Jacobson*, 179 U. S. 287; *Reid v. Colorado*, 187 U. S. 137.

On the other hand, it is said that Congress has already acted, has created the Interstate Commerce Commission, and given to it a large measure of control over interstate commerce. But the fact that Congress has entrusted power to that commission does not, in the absence of action by it, change the rule which existed prior to the creation of the commission. Congress could always regulate interstate commerce, and could make specific provisions in reference thereto, and yet this has not been held to interfere with the power of the State in these incidental matters. A mere delegation by Congress to the commission of a like power has no greater effect, and does not of itself disturb the authority of the State. It is not contended that the commission has taken any action in respect to the particular matters involved. It may never do so, and no

23 one can in advance anticipate what it will do when it acts.

Until then the authority of the State in merely incidental matters remains undisturbed. In other words, the mere grant by Congress to the commission of certain national powers in respect to interstate commerce does not of itself and in the absence of action by the commission interfere with the authority of the State to make those regulations conducive to the welfare and convenience of its citizens. Running through the entire argument of counsel for the Missouri Pacific is the thought that the control of Congress over interstate commerce and a delegation of that control to a commission necessarily withdraws from the State all power in respect to regulations of a local character. This proposition cannot be sustained. Until specific action by Congress or the commission the control of the State over these incidental matters remains undisturbed. But it is further contended that this is not a mere incidental matter, indirectly affecting interstate commerce, but directly a part of such commerce, and therefore beyond the power of the State to control, and in support of that, *McNeill v. Southern Railway Company*, 202 U. S. 543, is referred to. There are many points of resemblance between that case and this, but there is this substantial distinction: In that was presented and determined solely the power of a state commission to make orders respecting the delivery of cars engaged in interstate commerce beyond the right of way of the carrier and to a private siding—an order which affected the movement of the cars prior to the completion of the transportation, while here presented, as heretofore indicated, the question of

the power of the State to prevent discrimination between shippers, and the common law duty resting upon a carrier was enforced. This common-law duty the State, in a case like the present, may, at least in the absence of Congressional action, compel a carrier to discharge.

We see no error in the ruling of the Supreme Court of Kansas, and its judgment is affirmed.

Mr. Justice HOLMES:

I concur in the judgment on the ground that the cars had not yet been appropriated to interstate commerce, and so were subject to state control. For this reason I have not found it necessary to make up my mind on the considerations that will be urged by Mr. Justice Moody, although I am inclined to agree with his views.

24 Mr. Justice Moody, dissenting:

I find myself unable to agree in the reasoning by which the judgment of the state court is affirmed. Upon the peculiar facts of this case, it is possible to say that the cars, whose transfer was directed, did not become the subjects of interstate commerce until they had been selected as such after their delivery upon the tracks of the Santa Fe Railroad. If the decision were put upon that ground, I should be silent.

But it is assumed that three-fifths of them were interstate shipments, and with respect to such shipments, I am constrained to believe that the judgment of the court below exceeded the power of the State. The division of the governmental power over commerce made by the Constitution, by which the control of interstate commerce in the Nation and the control of intrastate commerce is vested in the States, together with the fact that both kinds of commerce are often conducted by the same persons and corporations through the same agencies gives rise to highly perplexing questions in practice. The regulation of carriers and other instrumentalities of commerce is constantly undertaken both by the Nation and the States, and the extent and limit of the respective powers vested in each government, as far as possible, ought to be accurately ascertained and declared. This is demanded imperatively by the orderly conduct of the vast transportation agencies which are engaged in both kinds of commerce. They ought not to be left uncertain as to the power to which they are responsible.

I venture to think that the weight of authority establishes the following principles: The commerce clause of the Constitution vests the power to regulate interstate commerce exclusively in the Congress and leaves the power to regulate intrastate commerce exclusively in the States. Both powers being exclusive, neither can be directly exercised except by the government in which it is vested. Though the State may not directly control interstate commerce, it may often indirectly affect that commerce by the exercise of other governmental powers with which it is undoubtedly clothed. And this indirect effect may be allowed to operate until the Congress

enacts legislation conflicting with it, to which it must yield as the paramount power. *Gibbons v. Ogden*, 9 Wheat, 1, 204; *Atlantic Coast Line v. Wharton*, 207 U. S. 328, 334; *Asbell v. Kansas*, 209 U. S. 251.

25 In the case at bar, upon the facts as they are assumed to exist, it seems to me that the judgment of the court below directly regulated interstate commerce. If this is so, it is unimportant that the Congress has been silent. A power clearly withdrawn from the State and vested in the Nation, can no longer be exercised by the States, even though the Congress is silent. Where the Congress fails to act, the subject enjoys freedom from direct control.

The principles which I have stated have been recently applied by this court in the case of *McNeill v. Southern Railway Company*, 202 U. S. 543. I cannot escape from the conviction that that case requires a reversal of the judgment of the court below, so far as it assumes to direct the conduct of interstate commerce. In that case the place of business of a private corporation was reached by a spur track connecting with the main track of the railroad. It had been the custom of the railroad to deliver cars consigned to this corporation from the main track to the spur track. In consequence of a dispute concerning demurrage, the railroad refused to continue thus to deliver cars. The State Commission made an order requiring the railroad to deliver certain cars engaged in interstate commerce upon the spur track on payment of freight charges. The order was held to be a regulation of such commerce, and repugnant to the commerce clause of the Constitution. In that case the regulation affected the last stages of the interstate journey. In this case it affects the first stages of the interstate journey. But in each case the commerce which was regulated was interstate. In that case the order was issued by a Commission and in this case by a court. But nothing turns upon that distinction, for by whatever state agency the power is exercised it is void, because it exceeds the authority which may rightfully be conferred by the State upon any agency.

I am not ready to assent to the proposition that although the Congress has vested in the Interstate Commerce Commission the authority to deal with the exact situation presented to us, that fact is immaterial, because the Commission has taken no action. If the Commission has the authority to deal with a question of this kind, those who have grievances ought to resort to that body for relief.

26 It is a very great hardship to subject the carriers to possible conflicting regulations and leave them uncertain which government may rightfully assert its controlling authority. So it was said in the *McNeill* case that the order there "asserted a power concerning a subject directly covered by the act of Congress to regulate commerce, and the amendments to that act, which forbid and provide remedies to prevent unjust discriminations and the subjecting to undue disadvantages by carriers engaged in interstate commerce." This statement was made as an additional reason for holding the state action invalid, and seems in conflict with the holding in this case. I am authorized to state that Mr. Justice White joins in this opinion.

27 Be it remembered, that in the consideration and final determination of the proceedings on the amended motion and claim of the plaintiff herein for damages, the supreme court of the State of Kansas, consulted and referred to only such portions of the record as are hereinafter shown by abstract, counter abstract, and other printed matter herein incorporated, including an abstract of the Report and Findings and Conclusions of the Commissioner.

28 Be it further remembered, that thereafter, and by leave of court on the 13th day of April, 1909, there was filed in the office of the clerk of the supreme court of the State of Kansas, an amended statement and claim for damages, which is in the words and figures as follows to wit: (See pages 28 to 34 of Counter Abstract of the Defendant.

29 Be it further remembered, that on the 5th day of April, 1909, the same being one of the regular judicial days of the January 1909 term of the Supreme Court of the State of Kansas, said court being in session at its court room in the city of Topeka, the following proceeding among others was had and remains of record in words and figures, as follows, to-wit: (See page 34 of the Counter Abstract of the Defendant.)

30 Be it further remembered, that afterward, on the 7th day of February, 1911, there was filed in the office of the clerk of the supreme court of the state of Kansas, the report of the Commissioner, together with his Findings of fact and Conclusions of Law, which with the exceptions taken thereto, are shown in the abstract thereof, in the words and figures as follows, to-wit:

31 Filed Jun- 15, 1911. D. A. Valentine, Clerk Supreme Court.

In the Supreme Court, State of Kansas.

No. 15167.

THE LARABEE FLOUR MILLS COMPANY, Plaintiff.

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Report, Findings and Conclusions of Hon. H. C. Sluss, Commissioner, and Objections and Exceptions Taken Thereto by Plaintiff and Defendant.

32 In the Supreme Court, State of Kansas.

No. 15167.

THE LARABEE FLOUR MILLS COMPANY, Plaintiff,

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Report of Commissioner.

Comes now H. C. Sluss, Commissioner, to take testimony and make findings of fact and conclusions of law in the above case, and reports to the Court:

That in the pursuance of the order of his appointment he took and filed his oath of office as prescribed.

That the taking of the testimony was begun at Hutchinson, Kansas, on June 15th, 1909.

That the testimony was reported by stenographers appointed by the consent of both parties at an agreed compensation of Ten Dollars per day of time employed; and Fifteen cents per folio for transcribing the same, which compensation was agreed to by both parties.

33 That the testimony taken and transcribed fills 1138 typewritten pages, and is bound in two volumes, returned herewith as Commissioner's Exhibits "D" and "E."

That a large number of exhibits were put in evidence, which are bound in seven volumes returned herewith as Commissioner's Exhibits "F," "G," "H," "I," "J," "K," and "L."

That I have made findings of fact and conclusions of law upon the evidence so introduced, which I return and file herewith.

That I was engaged fourteen days in taking the testimony and hearing the oral argument.

That I have been necessarily engaged six days in examining and considering the evidence and the briefs of counsel submitted thereon, and in the preparation of the findings and conclusions therefrom.

I ask that the account for said expenses and disbursements herewith submitted be approved; that a reasonable amount be allowed for the service performed; and an early day be fixed in which the same, after deducting the amount of \$113.15 now in my hands, shall be paid.

H. C. SLUSS,
Commissioner

34 *Findings of Fact and Conclusions of Law.*

In these findings the plaintiffs will be referred to as "The Mill Company," and the defendant as "The Pacific Company," and the Atchison, Topeka & Santa Fe Railway as "The Santa Fe."

I deem it convenient for the purposes of consideration that the findings be made upon the claims presented by the Mill Company for damages separately.

First.

The claim for hauling flour, grain and millstuffs and feed from the mill to the cars on the Santa Fe track, a force of men and teams necessarily employed to make such transfers, and aggregating the sum of \$2,415.65.

Upon this first claim I find the facts to be, that by reason of the suspension of transfer service by the Pacific Company the Mill Company was compelled to and did employ a force of men and teams to transfer a large portion of its flour, millstuffs and feed from the mill to the cars on the Santa Fe track.

The transfer service was suspended on August 29th, 1906.

35 The transfer from the mill to the cars on Santa Fe tracks was begun September 8th, 1906, and continued until March 30th, 1907.

The alternative writ of mandamus was allowed and issued on September 15th, 1906, and served on September 18th, 1906.

The judgment of this Court awarding a peremptory mandamus was given on December 8th, 1906.

The amount paid out for men and teams in this transfer service from the time of the suspension to the date of the alternative writ was \$28.80.

The amount paid out for the same service from September 15th, 1906, the date of the alternative writ, to December 8th, 1906, the date of awarding the peremptory mandamus, was \$1027.59.

The amount paid out for the same service from December 8th, 1906, to March 30th, 1907, was the sum of \$1359.27.

To determine justly the amount the Mill Company is entitled to recover on this claim, there should be deducted Two Dollars per car for each carload transferred by teams.

The evidence does not show the number of cars loaded from teams, nor are the data given in the evidence sufficient to enable me to form a just estimate of the number.

36 Second.

The claim for a force of four men employed 168½ days in loading and unloading flour transferred by teams from the mill to the Santa Fe track at \$1.50 per day, amounting to \$1011.00.

Third.

For the time of Fred Newman occupied in overseeing the transfers by team 168½ days at \$2.50 per day.

As to the second and third claim, I find that six days of this employment, amounting to \$51.00, occurred prior to the date of the issuance of the alternative writ; that 78 days of this employment, amounting to \$663.00, occurred from the issuance of the alternative writ to the giving of the judgment allowing the peremptory mandamus; that 84½ days of this employment, amounting to \$718.25, occurred subsequent to the giving of the judgment awarding peremptory writ;—making the total for the two claims, \$1432.25.

I find that the expenditures above specified were actually made, and that the same were reasonably necessary, and rendered so by the fault of the Pacific Company.

It is objected and contended by the Mill Company, that it is shown in the evidence that 85% of the products of the mill intended to be shipped by the Mill Company via the Santa Fe was destined
37 to points which could have been reached by shipment via the Missouri Pacific; that it was the duty of the Mill Company to mitigate its damages by all means reasonably within its reach; that it was within the power of the Mill Company to have

compelled the Pacific Company to furnish all the cars it needed to reach the common points by serving the written demand and making the cash deposit provided for by the Statute of Kansas.

That it being within the power of the Mill Company to ship its product by the Missouri Pacific to these common points to the extent of the 85% mentioned, the damages comprehended in claims One, two and Three should be mitigated in favor of the Pacific Company to that extent.

This objection and contention presents itself as in the nature of a plea of mitigation of damages.

It assumes, that to the knowledge of the Mill Company the Pacific Company was prepared to furnish, and ready and willing to furnish to the Mill Company promptly on reasonable request, the cars needed and as needed to enable the Mill Company to deliver its product at the common points as promptly and satisfactorily as could be done by shipment over the Santa Fe in the manner in which those shipments were conducted.

38 The burden of proving all the elements of this assumption to be correct rests upon the Pacific Company.

There is a failure of proof on the part of the Pacific Company to establish this contention.

I conclude, as to the first, second and third claims, that the only damages recoverable are those which were sustained incident to the mandamus proceeding.

The jurisdiction of this Court did not attach until the issuance of the alternative writ.

Up to that time it was optional with the Mill Company to avail itself of mandamus, or to pursue its remedy in an ordinary action in a court of general jurisdiction for its damages sustained as a result of the refusal of the Pacific Company to afford the transfer service.

This court has no jurisdiction to award such damages. Its only power to award damages is by virtue of its jurisdiction of the mandamus proceeding, which has its inception with the alternative writ.

I disallow the first claim as to the \$28.80 accruing prior to the alternative writ.

I allow the first claim as to the \$1027.59 accruing from the alternative writ to the date of awarding the peremptory mandamus.

I allow the first claim as to the \$1359.27 accruing subsequent to the date awarding the peremptory mandamus.

39 I disallow the second and third claims as to the \$51.00 accruing prior to the alternative writ.

I allow the second and third claims as to the \$663.00 accruing from the alternative writ to the date of awarding the peremptory mandamus.

I allow the second and third claims as to the \$718.25 accruing subsequent to the awarding the peremptory mandamus.

To the foregoing findings supporting the First, Second and Third Claims, the Pacific Company has presented the following objections and exceptions:

First.

"The defendant objects to the first finding, and moves that the same be set aside, for the reason that the same is based exclusively upon incompetent and hearsay testimony, and not supported by any competent evidence, and, in making such finding, the Referee or Commissioner has received and considered, and acted upon, evidence which was incompetent and hearsay, and defendant was deprived of a fair and impartial hearing, because of the assurance of the Referee or Commissioner that only competent evidence would be considered in making findings of fact, and because, by allowing such items, the defendant has been denied the equal protection of the law, in violation of the Constitution of the United States.

40

Second.

"The defendant objects to the allowance of each item mentioned and specified in findings second and third, for the reason that the only basis therefor is incompetent and hearsay evidence, and the same, nor any thereof, are sustained or supported by any competent evidence, and to allow the same is to deny to the defendant the equal protection of the law, and deprive it of its property without due process of law, and to deprive the defendant of that fair and impartial consideration of the question involved to which it is entitled."

I deem it proper to call attention to the testimony in the record, in support of these claims, in view of the objection made.

The testimony was that of the witness F. D. Larabee, given in his examination, beginning at page 418 of the official transcript of the testimony, which is as follows:

(Questions by Mr. Waters.)

"Q. Mr. Larabee, referring to this statement for damages, I call your attention to the first claim, for hauling flour, grain and mill-stuffs and feed from the mill and elevator of plaintiff to the cars on the Santa Fe track, aggregating the sum of \$2415.65. And the second one: A force of four men employed for 168½ days, two at the mill and two at the cars, to assist in loading and unloading at \$1.50 for each laborer per day, making a total of \$1011.00. Will you state to the court what you paid out, what you engaged the men for—give as near as you can this information in detail.

41

A. We have the items here.

Q. Is that a list of laborers you employed and paid for all this service?

A. Yes, sir.

Q. By what reason was it made necessary to do that?

A. It was necessary on account of no switching.

Q. It was obligatory?

A. Either that or shut down the mill.

Q. Have you got the list there—how much is that claim there, \$2415.65? Does that represent the correct list?

A. Yes, sir.

Q. And was money that was paid out by you for that service?

A. Yes, sir.

Q. The entire \$2400.00?

A. I think that is it, the entire \$2400.00, the first claim. (The statement in question was marked "Exhibit A" and is found as "Exhibit A" at the end of Volume 3 of the official transcript.)

Q. Now we will take the second claim. A force of four men employed for 168½ days, two at the mill and two at the cars, to assist in loading and unloading at \$1.50 for each laborer per day, making a total of \$1011.00. Will you please state to the Court what that was for.

A. Two men to assist in loading the wagons and two men at the cars to assist in unloading.

Q. Common laborers?

A. Common laborers.

Q. How much did you pay them?

A. \$1.50 per day.

Q. How many days?

A. 168½ days.

Q. Would that have been necessary had the switching service been there?

A. No, sir.

Q. What was the total of that expense?

A. \$1011.

42 Q. Now we will go to the third claim: From the time of Fred Newman necessarily occupied in overseeing and attending to the transfers, 168½ days at \$2.50 per day, making a total of \$420.25. Please tell the Court about that.

A. Mr. Newman was the foreman that checked all the stuff out. He had the superintending of the loading and check cars. He saw that the stuff got in the right cars and the right amount, and so on.

Q. Was that made necessary by the discontinuing of this transfer service?

A. It was.

Q. You were paying him \$2.50 per day?

A. We were.

Q. Was this amount actually paid out by you?

A. It was.

Q. \$420.25 to Newman?

A. Yes, sir; we had to employ another man in his place."

I conclude from this that the witness was using a list from which he testified, but that there is nothing to warrant the conclusion that he was not testifying from his own knowledge as to the actual amount paid and as to the service rendered.

Beginning with page 519, Volume 2, Stenographer's transcript, the witness F. D. Larabee was cross-examined as to the correctness of two statements of expenses for hauling from the mill to the Santa Fe and loading cars.

43 This cross-examination and the answers of the witness to the questions of counsel therein, did not have reference to the list from which the witness had testified in chief, hereinbefore quoted as appearing on page 418, Stenographer's transcript; but it refers to a schedule filed in the Supreme Court at or about the time of awarding the peremptory mandamus and to a second schedule or statement filed at or about the time of entering the mandate of the Supreme Court of the United States.

The judgment of the Commissioner finding the amounts of liability for this hauling and loading service was and is based upon the direct and positive testimony of the witness Larabee contained in pages 418 and 419, Volume 2, Stenographer's transcript.

The Commissioner is of the opinion that the testimony was not secondary evidence, nor hearsay, and was competent, and the objections to its reception were on that ground disallowed.

Fourth Claim.

For loss sustained by reason of the complete shut-down of the mill one-half day in November, and also one day each on the 1st, 3rd, 4th, 24th and 26th days of December, 1906, and the 1st, 2nd, 12th, 28th, 29th and 30th days of January and the 27th and 28th days of February, 1907, by reason of inability to transfer 44 the products of the mill, caused by the suspension of the transfer service, and the inability to effect the transfer by any other means.

I find that the mill was completely shut down on the days named. That the shut-down was caused by inability to get the flour already in sack ready for loading out of the way of the continually added product, thereby consuming all the storage capacity of the Mill Company's mill and warehouse, which would not have occurred but for the suspension of the transfer service.

I find that the capacity of the mill was 700 barrels of flour per day; that with the exception of the days mentioned it was run to its full capacity, and to a reasonable certainty would have been run to its full capacity on those days had the transfer service not been suspended; that other mills situated in the same part of the State with similar advantages and of similar character and conducted with no greater degree of skill and business judgment, made a profit of 20 cents per barrel of flour manufactured during the same period.

I find that by reason of the suspension of the transfer service and the consequent inability to operate the mill during the 13½ days 45 mentioned, the Mill Company sustained a loss of profit from the operation of the mill in the amount of \$140.00 per day, making a total loss of profit of \$1890.00.

There was evidence introduced that the Mill Company was compelled to pay salaries of employes who could not be laid off and their salaries suspended, during the period of the shut-down as mentioned, in the sum of \$109.25. No claim having been filed for this item of

damages, the fourth claim being restricted to the known profits of the mill, I conclude it is not properly allowable as damages.

I allow the Fourth claim in the sum of \$1890.00.

Fifth Claim.

For loss of profits of the mill by reason of inability to grind corn and market corn products, caused by the suspension of the transfer service, for 117 days, at \$100.00 per day, \$11,700.00.

I find from the evidence that the Mill Company's mill is equipped for grinding corn and the production of corn products, and has a maximum capacity of 100,000 pounds of corn per day; that the Mill Company ground but little corn during the period of the suspension of the transfer service.

There is no evidence of the price of corn or of corn products during that period, or of the cost of manufacture; nor evidence
46 of the work and profits of other mills of similar character and similarly located as the Mills Company's.

The only evidence being the estimate of witnesses based on the maximum capacity of the mill, and the fact that it was an unusually good corn year, and the fact that the Mill Company had made money in handling corn through their elevator located on the Santa Fe during the same period, and the belief of the witness that the Mill Company could have ground a large amount of corn, and that the view of the conditions it would have yielded a profit of ten cents per hundred pounds.

I conclude that the evidence is too indefinite and uncertain, based too largely upon estimate opinion and assumption to justify a finding that there was a loss of profit by reason of inability to grind corn, or if there was a loss, how much it amounted to; and I find the claim not proven.

I disallow the Fifth claim in toto.

The Sixth, Seventh and Eighth, are for money expended for legal advice secured by the Mill Company as to the best course to pursue in view of the suspension of the transfer service.

Vandiveer & Martin were consulted, and paid \$25.00, which I find to have been a reasonable fee.

47 Waters & Waters were consulted, and paid \$75.00, which I find to have been a reasonable fee.

C. C. Webb was consulted, and I find that \$50.00 would be a reasonable fee for his services.

I find that the services specified in the last three paragraphs, being set forth in claims Six, Seven and Eight, were rendered and the liability therefor incurred prior to the issuance of the alternative writ of mandamus.

I disallow the Sixth, Seventh and Eighth claims in toto.

Ninth Claim.

For the value of the professional services of Waters & Waters, in bringing and prosecuting the mandamus proceeding in the Supreme Court of Kansas, in the sum of \$2500.00.

I find that the mandamus proceeding was a proper and necessary proceeding to be instituted by the Mill Company.

That Waters & Waters were employed for that purpose, and instituted and successfully conducted the same, and that these services were reasonably worth \$2500.00.

I allow the Ninth claim in the sum of \$2500.00.

48 Tenth, Twelfth, Thirteenth, Fourteenth and Fifteenth Claims.

For the professional services and expenses of attorneys employed by the Mill Company to represent it in the Supreme Court of the United States.

To Waters & Waters for services, \$40,000.00.

For the services of John F. Switzer, \$3,000.00.

For the services of Rossington & Smith, \$30,000.00.

For expenses of W. H. Rossington and J. G. Waters, attending the Supreme Court of the United States, April, 1908, \$500.00.

For the expenses of Charles Blood Smith and J. G. Waters for attending the Supreme Court of the United States, October, 1908, \$480.60.

Upon these claims I find, that, following the judgment of this Court awarding the peremptory mandamus, the Mill Company caused a writ of error to be issued December 24th, 1906, to the Supreme Court of the United States from said judgment, and on the same day filed a supersedeas bond in this Court, which bond was approved by the Court, and thereupon the Mill Company filed its petition in error in the Supreme Court of the United States, together with its transcript of the record and of the cause.

49 The Pacific Company presented the following assignments of error:

That the Supreme Court of Kansas erred—

1st. In deciding that the switching service required was not in any part Inter-State Commerce.

2nd. In deciding that the subject-matter of the suit was not governed by the Acts of Congress regulating Commerce.

3rd. In deciding that the Pacific Company was under obligation to perform the transfer service required of loaded cars destined to points without the State of Kansas.

5th. In deciding that it had jurisdiction to compel the Pacific Company to render the transfer service required in the carriage of property subjects of Inter-State Commerce destined to points without the State of Kansas.

6th. In assuming jurisdiction of the suit in so far as it involved the carriage of property the subject of Inter-State Commerce.

7th. In deciding that Chapter 345, Laws of 1905, of Kansas, was not invalid in so far as it attempted to compel the transfer or carriage of property subject to Inter-State Commerce destined to points without the State of Kansas.

In support of these assignments counsel for the Pacific Company presented a brief and argument containing 107 pages; in which it was contended:

First. That the Supreme Court of Kansas erred in sustaining a demurrer to the plea in abatement to the alternative writ of mandamus, and argued that the purpose of the writ was to compel the Pacific Company to give to the Santa Fe the use of its tracks and terminal facilities for purposes of interstate traffic in violation of Sec. 3, Chap. 104 of 24th U. S. Stat., which, while providing that all common carriers subject to the Inter-State Commerce law should afford all reasonable and equal facilities for the interchange of traffic between their respective lines, contained the limitation that it should not be construed as requiring such carriers to give the use of its tracks or terminal facilities to another carrier, citing from decisions in support of this contention.

Second. In support of the second, third and fourth assignments of error it was argued, that the Mill Company did not base its claim and the Supreme Court of Kansas did not base its decision on any constitutional or statutory requirement of the State of Kansas; that the alternative writ did not allege a discrimination in favor of other industries at Stafford; that there was no contractual obligation between the Pacific Company and the Mill Company; that the

51 Pacific Company had not assumed any common-law duty as a carrier toward the Mill Company as an industry at Stafford; that there was no duty resting upon the Pacific Company toward the Mill Company the performance of which could be enforced by mandamus; that the service theretofore performed by the Pacific Company was either as agent of or as a connecting carrier with the Santa Fe; that the transfer service as to three-fifths of it was part of shipments out of the State of Kansas into other States; that the Inter-State Commerce Act as amended, and the powers by it vested in the Inter-State Commerce Commission were so comprehensive as to conclusively show it to be the intention of Congress to control and regulate the carrier engaged in inter-state commerce to the exclusion of the States; that this control extends to the use of terminal facilities and to the movement and handling of cars in the yards, and vests in the Inter-State Commerce Commission exclusive jurisdiction.

These propositions were supported by a masterly and exhaustive analysis of the provisions of the Constitution and the Statutes and decisions bearing upon the subject, covering 52 pages, and citing 50 decisions, chiefly of the Supreme Court of the United States.

Third. In support of the fifth assignment of error, it was argued that the tracks, switches and facilities of a carrier which engaged in carrying inter-state commerce were instrumentalities of Inter-State Commerce; that the Act of Congress was intended to cover the entire field of Inter-State Commerce, including all instrumentalities used in that commerce; that the control of these

instrumentalities was by the Act committed exclusively to the Inter State Commerce Commission; that the decision of the Supreme Court of Kansas was an assumption of jurisdiction to control the use of the tracks, switches and instrumentalities of the Pacific Company in inter-state commerce, and that the awarding the peremptory mandamus was beyond its jurisdiction and a nullity. Citing the decision of the Supreme Court of the United States in *Ry. Co. v. Inter-State Commerce Commission*, 162 U. S. 940, and *Ry. Co. v. Abilene* (—).

Fourth. It was contended in the brief that the Supreme Court of Kansas was without jurisdiction of the controversy to compel the Pacific Company to use its tracks, switches and facilities in the transfer of traffic which was wholly intra-state.

In support of this contention it was earnestly and ably argued that notwithstanding the proviso in the Act to the effect "that the provisions of this Act shall not apply to the transportation of passengers

53 "or property, or to the receiving, delivering, *store* or handling
"of property wholly within our State, and not shipped to or

"from a foreign country from or to any State or Territory," from the entire Act the conclusion is irresistible that by this proviso Congress meant to withdraw from the operation of the Act and exclusive control of the Inter-State Commerce Commission only articles or property subjects of shipment within the State, but did not intend thereby to withdraw from the exclusive control of the Commission the use of the tracks, switches and facilities of an inter-state carrier. It being contended that this Court by its decision assumed control of the latter.

In support of this contention, 17 pages of the brief were devoted, citing 28 decisions of the Supreme Court of the United States and of various States, and containing a close analysis of the Inter-State Commerce Act and the Statutes of Kansas.

Subsequently counsel for the Pacific Company filed an additional brief and argument, 78 pages of which were devoted to the propositions of the first brief.

It was reasonably necessary for the Mill Company to employ counsel to represent it in the Supreme Court of the United States of professional standing, learning and experience to adequately combat the contentions and answer and arguments of counsel for the Pacific Company.

54 For this purpose the Mill Company employed, in addition to Waters & Waters, W. H. Rossington, Charles Blood Smith and John F. Switzer, who were well equipped and qualified to adequately present the case of the Mill Company to the Supreme Court of the United States.

The compensation and expenses of these gentlemen under that employment constitute the Ninth, Tenth, Eleventh, Twelfth, Thirteenth, Fourteenth and Fifteenth claims of damages filed by the Mill Company.

It is objected by the Pacific Company that these items cannot be allowed, for the reason that these were expenses incurred in a matter pending in the Supreme Court of the United States, and not in this Court; that the Judiciary Act of the United States requires that

on allowance of a writ of error to that Court from the Supreme Court of a State, a bond shall be taken conditioned that the plaintiff in error shall answer all damages where there is a supersedeas, and where judgment is affirmed the Court shall adjudge to the respondent in error just damages for his delay. That there was a supersedeas in this case; that by reason of the provisions of the Judiciary Act this Court is deprived of all power to allow as damages in this proceeding any damage, outlay or expense incurred as a result of

55 the proceeding in error; that the only remedy of the Mill Company on the claims specified would be an application to the Supreme Court of the United States for their allowance, or by an action upon the supersedeas bond; and that the Supreme Court of the United States did allow the Mill Company \$20.00 as and for counsel fees in that Court.

Upon this objection I conclude:

That the jurisdiction of this Court in mandamus is the creation of the Constitution and the Statutes of the State of Kansas.

That this Court is the sole judge of what the Constitution and those Statutes provide.

That the jurisdiction of this Court in mandamus over persons within its jurisdiction, cannot be affected by Act of Congress.

That the Judiciary Act does not and was not intended to affect the jurisdiction of this Court.

That the jurisdiction of this Court in mandamus attaches upon the issuance of the Alternative writ, and the subject-matter of the proceeding being the awarding a peremptory mandamus, that jurisdiction continues unabated, not only until the writ is awarded, but also until the writ is issued and obedience to it enforced.

56 That the Alternative writ is a command of the performance of specified and prescribed duties; and return to the writ is a refusal to perform the duties prescribed; the judgment awarding a peremptory mandamus is a conclusive adjudication that such refusal was wrongful, and the act of the Court compelling compliance with the command of the alternative writ.

That the damages comprehended by the Kansas Statute are the injuries sustained as the natural and probable consequences of the wrongful refusal to comply and the expenses reasonably and necessarily incurred in compelling compliance, with the command of the alternative writ.

That the allowance of the writ of error did not operate to remove the suit from the Supreme Court of the State into the Supreme Court of the United States; its only effect was to bring up the record for purposes of review.

The allowance of the writ of error did not operate as a supersedeas; the taking the supersedeas bond brought about the supersedeas. The taking the bond, and the supersedeas itself, in so far as it can be conceived of as a substantial act, was the action of the Supreme Court of Kansas.

I conclude that the objection should be disallowed, and a claim for the reasonable compensation of the attorneys mentioned for their

57 services in the case in the Supreme Court of the United States, and their reasonable and necessary expenses, should be allowed as part of the damages sustained by the Mill Company.

I find, that no agreement has ever been had between the Mill Company and any of the attorneys as to the amount of their compensation; that neither of the attorneys has at any time entered on his books a charge against the Mill Company for services rendered, nor have they informed the Mill Company of the amount intended to be charged; nor have they determined in their own minds any definite amount intended to be charged.

I find, that the attorneys will claim the full amount, and will accept whatever amount that shall be determined by this Court in this proceeding to be a reasonable compensation for their services in the case and allowed as part of the damages.

I further find, that it is mutually understood between the Mill Company and the attorneys named, that whatever amount is recovered in this proceeding on account of fees and expenses of counsel will be paid by the Mill Company to, and accepted by the attorneys as a full discharge of the liability to them.

58 The attorneys for the Mill Company prepared and filed three briefs and arguments in answer to the briefs and the arguments presented by the Pacific Company, in which the several propositions and contentions of the Pacific Company were examined, discussed and negatived; and in which a large number of decisions of the Supreme Courts of the several States cited, quoted and dilated upon.

The principal questions discussed were, that the switching service required by the decision of this Court was not part of an interstate transit, but entirely local and preliminary; that the Interstate Commerce Act by any reasonable construction did not vest in the Interstate Commerce Commission control of a railroad and its terminal facilities to the exclusion of any control by the State of commerce on such road and terminal facilities which were wholly within the State; that the duty of the Pacific Company to perform the switching service in controversy rested upon it by reason of its voluntary assumption of it as a common carrier; that the construction of the Interstate Commerce Act contended for by the Pacific Company that exclusive control of all commerce by an interstate carrier, was at best a mere inference, and not apparent from any language in the Act, and was negatived by the plain wording of the limitation as to commerce within the State in the Act itself; that by the uniform holding

59 of the Supreme Court of the United States, legislation of the State which might indirectly affect interstate commerce, but which was not in conflict with a regulation by Congress, and placed no burden upon Interstate Commerce, was not invalid. In these briefs it also contended that if the Interstate Commerce Act could be construed to vest in the Commission control of the tracks and facilities of an interstate carrier to the exclusion of regulation by the State of commerce wholly within the State, it would be in that respect void as beyond the constitutional power of Congress. The discussion of this latter proposition included an examination of

a number of decisions of the Supreme Court of the United States sustaining the contention, and was most able and exhaustive, and conclusive of the soundness of the proposition.

For this service the Mill Company claims as part of its damages as follows:

Ninth Claim. For the value of the services of Waters & Waters, the sum of \$40,000.00.

Twelfth Claim. For the services of John F. Switzer, the sum of \$3,000.00.

Thirteenth Claim. For the services of Rossington and Smith, the sum of \$30,000.00.

Fourteenth Claim. For expenses of W. H. Rossington and J. G. Waters to Washington City to attend a session of the Supreme Court in April, 1908, the sum of \$500.00.

Fifteenth Claim. For expenses of Charles Blood Smith and 60 J. G. Waters to Washington City to attend a session of the Supreme Court, October, 1908, the sum of \$480.00.

In support of these claims the Mill Company introduced the opinions of a number of lawyers, all of whom are well known to this Court. Their opinions were given in answer to a hypothetical question, a copy of which is filed with this report as Commissioner's Exhibit "A." The opinions as to the value of these services so given are the following:

A. M. HARVEY: I should say \$35,000 would be a reasonable fee for the entire work; Waters & Waters \$20,000, Rossington & Smith \$10,000, and Switzer \$5,000.

E. S. QUINTON: A fee of \$50,000 would be a reasonable fee.

LEE MONROE: The fee for all the attorneys \$30,000.

GEORGE H. WHITCOMB: I should say somewhere from \$25,000 to \$35,000.

M. M. MILLER: In my judgment from \$30,000 to \$40,000.

W. E. STANLEY: A reasonable attorneys' fee would be from \$30,000 to \$40,000.

T. W. SARGENT: \$40,000.

KOS HARRIS: \$35,000 to \$40,000.

J. F. GETTY: \$35,000.

61 W. F. GUTHRIE: \$50,000.

JOHN H. ATWOOD: \$40,000 as a minimum.

WM. G. HOLT: \$50,000.

E. C. LITTLE: \$50,000.

L. C. BOYLE: \$35,000 to \$40,000 in the Supreme Court of the United States, and \$5,000 in Kansas Supreme Court.

In contrast with these opinions the Pacific Company introduced the opinions of a number of lawyers, all of whom are well known to this Court. Their opinions were given in answer to a hypothetical question, a copy of which is filed with this Report as Commissioner's Exhibit "B." These opinions as to the value of the services so given are the following:

MATT G. CAMPBELL: \$750; my best judgment, \$1500.

M. A. LOW: \$1000 State Court, \$1000 in United States Court; out of this fee in the United States Supreme Court, should be

deducted the expenses of both trips, and if going to two attorneys, the balance should be divided between them.

O. J. WOOD: \$1000 in Supreme Court of Kansas; from \$1000 to \$1500 in United States Supreme Court.

J. D. McFARLAND: \$1000 to \$1500 in State Court, and same in United States Court.

J. S. WEST: \$1000 in Supreme Court of Kansas, \$1500
62 and expenses in Supreme Court of United States; \$30,000 or \$40,000 would not be too much if it involved the actual life and vitality of a business to make that a reasonable basis at all.

T. F. GARVER: \$1000 and expenses in the State Supreme Court, and \$1500 and expenses in United States Supreme Court.

W. R. SMITH: \$1000 to \$1200 in State Supreme Court, and \$2500 in United States Supreme Court.

J. G. SLONECKER: \$500 and \$25 a day in Supreme Court of Kansas, and \$2000 or \$3000 and expenses in United States Supreme Court, and actual expenses.

H. L. ALDEN: \$750 in State Supreme Court, and \$2000 in United States Supreme Court.

R. MILLER: \$1000 in State Supreme Court, and \$2000 to \$2500 in United States Supreme Court.

A. L. BARGER: \$1000 in State Supreme Court, and \$2000 in United States Supreme Court.

As to both lines of witnesses, those on the part of the Mill Company as well as those on the part of the Pacific Company, these opinions were given without opportunity to give the question of what was really involved in the case as it stood before the Supreme Court of the United States, a thorough and careful study, but were given
63 after a reading and hearing read the hypothetical question in answer to which they were given respectively.

To form a just opinion as to the value of the professional service of a lawyer to his client in any given case, it is necessary to understand many elements involved in the problem. As applicable to this case there should be understood:

1st. The relation of the parties to each other; the obligations of the Pacific Company to the Mill Company, and the manner in which those obligations were imposed.

2nd. The action of this Court, and the grounds upon which it was based in awarding the peremptory mandamus.

3rd. The questions involved before the Supreme Court of the United States.

4th. The attitude of the Supreme Court of the United States as to the real questions involved as shown by the decisions of that Court upon those and kindred questions.

5th. The consequences to the Mill Company of a decision adverse to its contention.

6th. The consequences to the public at large of a decision adverse to the contention of the Mill Company and upholding the contention in its broadest significance of the Pacific Company.

64 7th. The manner and effectiveness of the presentation by the Pacific Company of its contention.

8th. The manner and effectiveness of the presentation of its contention by the Mill Company.

Upon consideration of the circumstances of the giving their testimony by the several opinion witnesses, and the remarkable line and width of cleavage between those called by the Mill Company and those called by the Pacific Company, I conclude that none of them had given the elements of the case such study and consideration as that this Court would be justified in adopting the opinions of any of them as a basis for its judgment as to the value of the services of the attorneys in the case in the Supreme Court of the United States for the amount of which the Mill Company had become liable.

Upon the question of the amount for which the Mill Company has become liable, the recovery of which is sought in claims Tenth, Twelfth and Thirteenth, I find:

That the action for a mandamus was not based upon nor any right sought to be enforced, predicated upon any duty of the Pacific Company imposed by a statute of Kansas, or any provision of the Inter-State Commerce Act.

65 That the duty sought to be enforced by mandamus was not a duty imposed, or sought to be imposed, upon the Pacific Company by this Court by its judgment.

That the duty sought to be enforced by the judgment of this Court was a self-imposed duty by the voluntary undertaking of the Pacific Company itself, of furnishing the same and equal facilities to the Mill Company which it at the same time furnished to other persons at the same place similarly situated and conditioned, the common-law duty of a common carrier.

That this self-imposed duty was not modified or restricted by any provision of the Inter-State Commerce Act. On the contrary, it was and is provided in Section 3 of that Act as follows:

"That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

"Every common carrier subject to the provisions of this Act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for their interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their lines and those connecting therewith."

66 That the jurisdiction of this Court to enforce the performance of the duty required by the alternative writ, was not affected by the fact that the switching service required comprehended the movement of property the greater part of which was intended by the Mill Company to become, or as a matter of fact would

from the initial movement from the mill become, subjects of interstate commerce.

That the enforcement of the performance of that duty as to articles of property subjects of interstate commerce was not, by express words or by implication, committed to the jurisdiction of the Federal courts.

That the enforcement of the performance of that duty by a State court is not incompatible with the full and free operation of every provision of the Interstate Commerce Act, nor incompatible with the discharge of every duty devolving upon, or exercise of every power and authority vested in the Interstate Commerce Commission by that Act.

That the State courts can exercise concurrent jurisdiction with the Federal courts in cases arising under the Constitution, laws or treaties of the United States, had been determined by repeated decisions of the Supreme Court of the United States.

67 The attitude of that Court was summed up and stated by Justice Bradley in *Claffin v. Houseman*, 93 U. S. 130, in which the question came prominently before that Court. It was said:

"The general question, whether State courts can exercise concurrent jurisdiction with the Federal courts in cases arising under the Constitution, laws and treaties of the United States has been elaborately discussed, both on the bench and in published treatises, sometimes with a leaning in one direction and sometimes in the other; but the result of these discussions has, in our judgment, been, as seen in the above cases, to affirm the jurisdiction where it is not excluded by express provision or by incompatibility in its exercise arising from the nature of the particular case."

In *Plaque Mines v. Henderson*, 170 U. S. 511, it was held that the conferring jurisdiction upon the Federal courts of a certain class of controversies, does not of itself manifest an intention to withdraw from the State courts concurrent jurisdiction of the same class of controversies. In the course of the opinion by Justice Harlan it was said:

"If it had been intended to withdraw from the State the authority to determine by its courts all cases and controversies to which the judicial power of the United States was extended, and of which jurisdiction was not given to the National Courts exclusively, such a purpose would have been manifested by clear language."

68 *Western Union Telegraph Co. v. Call Publishing Co.*, 181 U. S. 92, was a case in which the Publishing Company sued the Telegraph Company in a State court of Nebraska for redress for discrimination in news service between the Publishing Company and the *Lincoln Journal Company*.

The defense was that furnishing the news service involved was interstate commerce; that Congress alone could regulate it; that Congress not having acted, there was no law requiring the furnishing equal service at equal rates. This contention was denied by the decision, and in the course of the opinion Justice Brewer said:

"We are clearly of the opinion that this cannot be so, and that

the principles of the common law are operative upon all interstate commercial transactions except so far as they are modified by Congressional enactment."

Further, he said:

"Reference may also be made to the elaborate opinion of Judge Shiras holding the Circuit Court in the Northern District of Iowa, in *Murray v. C. & N. W. R. Co.*, 62 Fed. 24, in which is collected a number of extracts from opinions of this Court all tending to show a recognition of a general common law existing throughout the United States, not, it is true, as a body of law distinct from the common law enforced in the States, but as containing the general rules and principles by which all transactions are controlled, except so far as those rules and principles are set aside by express statute."

The case of *Murray v. C. & N. W. R. Co.*, 62 Fed. 24, referred to by Justice Brewer, arose upon a discrimination by the Railroad Company, brought in a State court and removed into the Federal Circuit Court under the removal Acts of Congress. The question of the jurisdiction of the State court was put in question. In the course of the opinion Judge Shiras said:

"A further point is made in support of the demurrer, to the effect that this court succeeds only to the jurisdiction of the State court in which the action was originally brought, and that State courts have no jurisdiction over cases arising out of interstate commerce, the argument being that, as the State cannot legislate touching interstate commerce, the State courts are without power to determine cases of the like character. This position is not well taken; the limitations upon the legislative power of the nation and of the several States do not necessarily apply to the judicial branches of the National and State governments. The legislature of a State cannot abrogate or modify any of the provisions of the Federal Constitution, nor of the acts of Congress touching matters within Congressional control, but the courts of the State, in the absence of a prohibitory provision in the Federal Constitution or Acts of Congress, have full jurisdiction over cases arising under the Constitution and laws of the United States. The courts of the States are constantly called upon to hear and decide cases arising under the Federal Constitution and laws, just as the courts of the United States are called upon to hear and decide cases arising under the law of the State, when the adverse parties are citizens of different States. The duty of the courts is to explain, apply, and enforce the existing law in the particular cases brought before them. If the law applicable to a given case is of Federal origin, the legislature of a State cannot abrogate or change it, but the courts of the State may apply and enforce it; and hence the fact that a given subject, like interstate commerce, is beyond State legislative control, does not, ipso facto, prevent the courts of the State from exercising jurisdiction over cases which grow out of this commerce. Had this action remained in the State court, in which it was originally brought, the court would have had jurisdiction to hear and determine the issues between the parties, because Con-

gress has not enacted that jurisdiction over cases of this character is confined exclusively to the courts of the United States, and therefore the jurisdiction of the State court was full and complete."

I conclude that the attitude of the Supreme Court of the United States, as shown by the fact of the decisions above recited having been made, was such that it would have seemed reasonably probable that the decision of this Court would be upheld, even should it be held that the switching service was interstate commerce, unless the appellate court could be convinced that the Interstate Commerce

71 Act had been withdrawn from the State court jurisdiction to enforce a common-law duty against an interstate carrier and vested the same exclusively in the Federal tribunals.

The Pacific Company made a great effort to secure such a construction of the Act, and forced upon the Mill Company the necessity of abandoning its legal rights, or of meeting the Pacific Company on its own ground and fighting it out on that line.

I conclude that it is no answer for the Pacific Company that the Mill Company could have minimized the damages by paying the unjust charges, or by building a railroad of its own.

I find that the Mill Company has incurred a liability to Waters & Waters for professional service in the case on appeal, including the twenty days' time consumed in the two trips to Washington in the sum of Five Thousand Dollars. And has incurred a liability to Rossington & Smith, including the twenty days' time consumed in the two trips to Washington, in the sum of Five Thousand Dollars. And has incurred a liability to John F. Switzer for ten days' time consumed in assisting in the preparation of briefs in the sum of Five Hundred Dollars. And has incurred a liability to Waters & Waters for expenses in the sum of Four Hundred and Ninety Dollars. And has incurred a liability to Rossington & Smith for expenses in the sum of Four Hundred and Ninety Dollars.

72

Seventeenth Claim.

Cash Paid Out for the Expenses of F. D. Larabee and F. S. Larabee from Stafford to Topeka.

The evidence in support of the Seventeenth claim is inconclusive and confusing.

I find that no more than three trips by F. D. Larabee and F. S. Larabee from Stafford to Topeka, Kansas, from the giving of the judgment awarding the peremptory writ until the decision of the Supreme Court of the United States was rendered, were really necessary.

As to the injury to the Mill Company proper by loss of time of these gentlemen in making these trips, there is no evidence except as to F. D. Larabee's salary at the rate of \$200.00 per month, which would be \$8.00 per day.

From the evidence I find that the liability of the Mill Company to F. S. Larabee would be the same.

I allow this claim as to these to the extent of \$186.00.

I find that the sending of J. D. Larabee to Topeka on the occasion of the hearing of this case in this Court was unnecessary, and I disallow any claim for his time or expenses.

Eighteenth Claim.

For Expenses and Per Diem of F. D. Larabee and J. G. Waters to St. Louis.

73 I find that the visits to St. Louis were made; that they were reasonably necessary, and made at the request of the Pacific Company, and that the charge of \$160.00 for time and expenses is reasonable.

I allow the Eighteenth claim in the sum of \$160.00.

Nineteenth Claim.

For Expenses of F. D. and F. S. Larabee in Three Trips from Hutchinson to Stafford, \$39.00.

I find that these expenses were incurred prior to the issuance of the alternative writ, and I disallow this claim.

Twenty-first Claim.

For three days' attendance of F. D. Larabee in the taking of testimony before the Commissioner after the alternative writ and prior to the judgment. I allow this claim in the sum of \$30.00.

Twenty-second and Twenty-third Claims.

For expenses before the Commissioner in taking testimony as to the amount of damages to be allowed the Mill Company, I conclude that no expenses incident to the prosecution of the several claims for damages are allowable, and therefore disallow these claims.

The question is presented in this hearing that the Mill Company is not entitled to recover any damages in this proceeding, for
74 the reason that the Mill Company, during the period in which the damages claimed arose, was a member of the Southern Kansas Millers Commercial Club; that this Club was an association of millers, and the object and purpose of it was to control the price of wheat and flour, and prevent competition in the purchase of wheat and in the sale of flour; and included in its membership, and allied associations, substantially all the persons engaged in the milling business throughout Kansas, Oklahoma and Texas; and was an organization in violation of the Anti-Trust Laws of Kansas.

A large amount of evidence was taken to prove this charge. An abstract of this evidence is contained in an abstract of the evidence in the case prepared by the Pacific Company, and printed and furnished to the Commissioner for his use; the abstract of the evidence on this question being shown from pages 147 to 200 inclusive, and is returned and filed herewith as Commissioner's Exhibit C.

I find that the Pacific Company's abstract of the evidence applicable to this question is a fair and full one, and it is adopted as the Commissioner's analysis of the evidence.

I find that it is not proven that the Southern Kansas Millers Commercial Club was at any of the times covered by the
75 claim for damages in this proceeding, an association for the purpose to create or carry out restrictions in trade or commerce, or in the full and free pursuit of any business authorized by law; to increase or reduce the price of grain or flour or mill products; or to prevent competition in the manufacture, transportation or sale of flour, or in the purchase and transportation of wheat; or to fix any standard or figure whereby the price of grain or flour or mill products to the public should be in any manner controlled or established, or to bind the members thereof not to sell, manufacture, dispose of or transport flour or mill products below a common standard figure, or to in any manner keep the price of grain, flour or mill products, or the transportation of any of the same, at a fixed or graded figure; or to establish or settle the price of any article or commodity or transportation between themselves and others, or to preclude free and unrestricted competition among themselves or others in the transportation, sale or manufacture of any such article or commodity.

I find that the performance of the switching service which was the subject-matter of this action, was not any part of the purposes of the organization of said Club; and that the performance of the switching service demanded by the Mill Company of the Pacific
76 Company in this action, was not a part of, or necessary to, the carrying out of any of the purposes of the organization of the Southern Kansas Millers Commercial Club.

I conclude that the judgment of this Court awarding the peremptory mandamus in this action, is an adjudication adversely to the Pacific Company of every question that was, or might have been, considered by this Court, whether presented by the Pacific Company in its return to the alternative writ of mandamus, or arising upon the suggestion of the Court itself, as a cause why the peremptory mandamus should not be awarded; and is an adjudication that the performance of the switching service demanded was a duty owing by the Pacific Company to the Mill Company, and that the refusal of the Pacific Company to perform that service was wrongful.

Recapitulation.

I find the Mill Company entitled to recover from the Pacific Company in the mandamus proceedings for its damages the following items:

On its First Claim.....	\$2,386.85
On the Second and Third Claims.....	1,381.25
On the Fourth Claim.....	1,890.00
On the Ninth Claim.....	2,500.00
On the Tenth, Twelfth, Thirteenth, Fourteenth and Fifteenth Claims.....	11,480.00
77 On the Seventeenth Claim.....	\$186.00
On the Eighteenth Claim.....	160.00
On the Twenty-first Claim.....	30.00
Making a total.....	<u>\$20,014.10</u>

The counsel for the respective parties entered into stipulations covering the saving of objections to testimony and exceptions to findings and conclusions and action of the Commissioner, which stipulation is returned herewith and filed with the exceptions of the respective parties.

The Mill Company has presented its exceptions to the foregoing findings and conclusions of law, which exceptions are returned and filed herewith.

The Pacific Company has presented its exceptions to the foregoing findings and conclusions of law, which exceptions are returned and filed herewith.

Respectfully submitted,

H. C. SLUSS,
Commissioner.

Stipulation.

It is stipulated and agreed by and between the respective parties hereto, that each party has reserved the right to present any objection or exception to the Referee, or to the Court, to any question, evidence, matter or proceeding herein, to the same purpose and with like effect as if such objection or exception had been made and exception noted at the proper time; and neither party shall be held to have waived any right to present to the Referee or to the Court any objection or exception by reason of having failed or neglected to have the same noted or made a matter of record at the time when such objection or exception might or should have been made, and record thereof preserved.

ROSSINGTON & SMITH,
JOHN F. SWITZER,
WATERS & WATERS,
Attorneys for Plaintiff.
B. P. WAGGENER,
Attorney for Defendant.

In addition to the stipulation already entered into between the parties above copied, as to objections and exceptions to be made to the Commissioner's findings of fact, conclusions of law, and his report on the case, it is agreed that it shall not be considered as necessary to take any objections or exceptions thereto before him, and

that the same are not waived, but the same may be made in the Supreme Court within ten days after the filing by the Commissioner of his report with his findings of fact and conclusions of law, the same exactly as if done before the commissioner.

WATERS & WATERS,
SMITH & SWITZER,
Attorneys for Plaintiff.
B. P. WAGGENER,
Attorney for Defendant.

January 17th, 1911.

In the Supreme Court, State of Kansas.

No. 15167.

THE LARABEE FLOUR MILLS COMPANY, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Before Hon. H. C. Sluss, Commissioner.

*Exceptions Taken to the Findings of Fact and Conclusions of Law
of the Commissioner, by the Plaintiff.*

I. The plaintiff excepts to the disallowance of the 5th claim for damages to plaintiff as contrary to the evidence and opposed to the law, and asserts that under the evidence and the law the claim should have been allowed.

II. The plaintiff excepts to the disallowance in part, of claims 10, 12, 14 and 15, for attorney-fees of Waters & Waters, Rossington & Smith, John F. Switzer and C. G. Webb, and asserts that under the evidence and the law, these claims should each of them have been allowed in a larger amount.

And the plaintiff files with the Honorable Commissioner these exceptions, that they may be embraced in or accompany with reference, his report made to the Supreme Court.

WATERS & WATERS,
C. B. SMITH, AND
JOHN F. SWITZER,
Attorneys for Plaintiff.

In the Supreme Court of the State of Kansas.

THE LARABEE FLOUR MILLS COMPANY, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Bill of Exceptions.

Now on this 17th day of January, 1911, the Referee or Commissioner having indicated what his findings would be, the defendant requested that the following findings be made, to wit:

Additional Findings Requested by Defendant.

First.

82 There was no evidence offered by the Mill Company tending to prove the amount of expenses incurred in hauling flour or other mill products from the mill to the cars, except that of F. S. Larabee and F. D. Larabee, whose testimony was not based upon their personal knowledge, but exclusively upon statements made to them by the Mill Company's bookkeeper. The books were not offered in evidence, to prove such items, and their absence in any manner accounted for. The bookkeeper did not testify. There was no evidence offered to support items or claims numbered one, two, three and four, except the testimony of F. S. Larabee and F. D. Larabee, whose sole means of information was based upon the statements made to them by the Mill Company's bookkeeper, who got his information from books which were not offered in evidence to prove or sustain such items. The bookkeeper did not testify.

Second.

I find from the evidence that, while the attorneys for the Mill Company expect to and will receive whatever amount is allowed the Mill Company, as damages on account of attorneys' fees, the Mill Company is under no obligation to pay them any amount in excess of what has heretofore been paid, unless such excess amount is allowed as an element of damage herein, in which event the Mill Company will be under obligation to pay such excess to its attorneys.

83

Third.

I find that, in the original proceeding before the Commissioner, J. G. Waters, as attorney for the Mill Company, was engaged three days, and in the preparation of brief in the Supreme Court, and argument, in all not to exceed three days.

B. P. WAGGENER,
Attorney for Defendant.

The Referee or Commissioner refused to adopt said findings, or either or any thereof, to which defendant excepted; and thereon defendant presented the following objections and exceptions to the findings of the Referee or Commissioner, to wit:

Objections to Findings of Fact Made by the Commissioner, and Application of the Defendant to Set Aside the Same, and to Make Other and Additional Findings of Fact.

The defendant, the Missouri Pacific Railway Company, objects and excepts to the following findings made by the Referee or Commissioner, and moves to set the same aside, viz:

First.

The defendant objects to the first finding, and moves that the same be set aside, for the reason that the same is based exclusively upon incompetent and hearsay testimony, and not supported by any competent evidence, and, in making such finding, the Referee or Commissioner has received and considered, and acted upon, evidence which was incompetent and hearsay, and defendant was deprived of a fair and impartial hearing, because of the assurance of the Referee or Commissioner that only competent evidence would be considered in making findings of fact, and because, by allowing such items, the defendant has been denied the equal protection of the law, in violation of the Constitution of the United States.

Second.

The defendant objects to the allowance of each item mentioned and specified in findings second and third, for the reason that the only basis therefor is incompetent and hearsay evidence, and the same, nor any thereof, are sustained or supported by any competent evidence, and to allow the same is to deny to the defendant the equal protection of the law, and deprive it of its property without due process of law, and to deprive the defendant of that fair and impartial consideration of the question involved to which it is entitled.

Third.

85 The defendant objects to the fourth item allowed by the Referee or Commissioner, because not sustained or supported by any competent evidence, and could not have been allowed under any circumstances, except by considering wholly incompetent and hearsay evidence, and the allowance of the same denies to the defendant the equal protection of the law, and deprives it of its property without due process of law.

Fourth.

The defendant objects to the ninth item or claim allowed by the Referee, for the reason that the same is not supported by any competent evidence, and to allow the same denies to the defendant the equal protection of the law, deprives it of its property without due process of law.

Fifth.

The defendant objects and excepts to the allowance of any amount on account of the tenth, twelfth, thirteenth, fourteenth and fifteenth claims, and demands, for the reason, among others heretofore assigned, that:

First. The Court is without jurisdiction in the premises.

Second. The items allowed are based upon incompetent and hearsay evidence.

Third. That in allowing the same, or any part thereof,
86 the defendant was denied the equal protection of the law,
and deprived of its property without due process of law.

Fourth. Because the evidence shows conclusively, and the Referee or Commissioner finds, in effect, that the Larabee Flour Mills Company has in fact sustained no damages by reason of such claims and demands, and has not paid the same, or become in any manner liable therefor, but makes such allowance upon the conclusion from the evidence that "the attorneys will claim the full amount, and will accept whatever amount that shall be determined by this court in this proceeding to be a reasonable compensation for their services in the case, and allowed as a part of the damages"; when, in truth and in fact, it appears conclusively from the evidence that said attorneys are to receive no other or additional compensation than such as may be allowed in this case; and the Referee or Commissioner, by making such allowance, does not do so upon the basis or theory that the Mill Company has been damaged by the payment, or obligation to pay, any such claims, or any thereof.

Sixth.

The defendant objects and excepts to the seventeenth, eighteenth
87 and twenty-first items or claims allowed, as not being sustained by any evidence, and not within the jurisdiction of the Court, and because, by allowing the same, defendant is denied the equal protection of the law.

Seventh.

The defendant objects and excepts to the conclusion that said Mill Company was not a party to and member of a trust and combination, in violation of the laws of the State of Kansas and of the United States.

B. P. WAGGENER,
Attorney for Defendant.

Which objections and exceptions were each overruled and denied.

H. C. SLUSS,
Referee or Commissioner.

88 Be it further remembered, that afterward on the 8th day of February, 1911, there was filed in the office of the clerk of the Supreme Court of the State of Kansas, the exceptions by the defendant to the report of the Commissioners and its motion to set the same aside, which are in the words and figures as follows, to-wit:—

89

In the Supreme Court of the State of Kansas.

Filed Feb. 8, 1911. D. A. Valentine, Clerk Supreme Court.

No. 15167.

THE LARABEE FLOUR MILLS COMPANY, Plaintiff,

VS.

THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Exceptions of the Defendant to the Report and Findings of the Commissioner and Motion to Set Aside the Report and Findings and Each Thereof.

Now comes the Missouri Pacific Railway Company, defendant, and specially excepts to the report and each of the findings of the Commissioner herein, and moves the Court to set aside each of the findings and conclusions of the Commissioner, for the following reasons, to-wit:

First.

Defendant excepts to the conclusion of fact and finding of the Commissioner allowing the two items of \$1,027.59 and \$1,359.27, for the reason that the same, or either thereof, are not supported by any competent evidence, and are based solely upon the testimony of the Larabees as to what their bookkeeper told them, and what they learned from their books, without producing said books, and without any foundation being laid therefor—all of which evidence was incompetent, hearsay, and not the best evidence of the fact sought to be proven,—and said items were allowed as being authorized under section 723 of chapter 182, Laws 1909 which section, as construed by this Court, is unconstitutional and void, and denies to this defendant the equal protection of the law, and deprives it of its property without due process of law. And for the further reason that such findings of fact and conclusion of the Commissioner are not supported by the evidence, but are contrary to the evidence, and each thereof should have been disallowed.

Second.

Defendant excepts to the second item or claim allowed, of \$1011.00, as being contrary to the competent evidence, based upon incompetent and hearsay evidence, and not sustained by any evidence, and not a proper element or measure of damage, and same is pretended to have been allowed under and by virtue of said section 723, of chapter 182, Laws 1909,—which, as construed by the supreme court of this state, is unconstitutional and void, and in violation of the Constitution of the United States, and denies to this defendant the equal protection of the law.

90

Third.

Defendant objects and excepts to item No. 3, for the reason that said item No. 3, aggregating \$1432.00, is not based upon any sufficient evidence, is contrary to the evidence, and contrary to law, in this: that the said — is pretended to have been allowed under and by virtue of section 723 of chapter 182, Laws of 1909, which section, as construed by the supreme court of this state, is unconstitutional and void; and for the additional reasons mentioned and set forth in the objections specially incorporated in the report of the Commissioner. And for the further reason that said item, and the preceding items, include damages which it is claimed accrued subsequent to the rendition of the judgment herein on December 8th, 1906, and this Court has no jurisdiction, right, power or authority to consider any item or claim which accrued, or is claimed to have accrued, subsequent to the date of said judgment.

Fourth.

Defendant objects and excepts to the Fourth item, of \$1,890.00, allowed by the Commissioner, for the reason that the same is not supported by sufficient evidence, is contrary to the weight of evidence, and is based wholly upon incompetent and hearsay evidence, which was duly objected to at the time, and includes items which it is alleged accrued subsequent to the date of the judgment which was entered December 8th, 1906; and this Court has no jurisdiction, right, power or authority to entertain any such claim; and that it appears from the record and transcript that the proceedings in this

91 Court had all been superseded by proceedings instituted in the supreme court of the United States, and this Court has no power, authority or jurisdiction to hear, try or determine any damages which it is claimed were sustained after the date that said judgment of December 8th, 1906, had been superseded by such proceedings in the Supreme Court of the United States.

And for the further reason that it appears conclusively from the evidence that the Mill Company closed and shut down their mill on the days mentioned in finding "fourth", in pursuance of and in compliance with a concerted plan among the members of the Southern Kansas Millers' Club and the Oklahoma and Texas Association of Millers, for the purpose of depressing the market for grain, and increasing the demand and price for flour; and the evidence further shows conclusively that the profits of said Mill for the months of December, 1906, and January and February, 1907, involved in the alleged shut-down, and on account of which the Commissioner has allowed the item of \$1890.00, were the greatest in the history of the operation of said Mill.

That the allowance of said item gives to said Mill Company a premium for a violation of the Anti-Trust Laws of Kansas, and the Anti-Trust laws of the United States, and for this Court to allow said item will deny to this defendant the equal protection of the law, and deprive it of its property without due process of law. That the large proportion of said item, it is alleged, and is found to have accrued

after the final judgment herein, and after this cause had been removed into the Supreme Court of the United States, and this Court had lost jurisdiction hereof.

Fifth.

The allowance of the ninth item or claim of \$2500.00 is not supported by any evidence, and is contrary to the conceded and undisputed facts in the case, as shown by the evidence.

It appears from the record that J. G. Waters fixed the value of his services before the Referee at one hundred dollars (Rec. Vol. 2, p. 666), and, for preparation of brief and argument in this Court, in these words: "If I get fifty or a hundred dollars for it, I would be making a fair charge"; (Rec., Vol. 2, p. 670), and the payments made by the Mill Company to Waters & Waters for services in this Court are most significant, viz:

92	September 5th, 1906.....	\$75.00
	October 13th, 1906.....	250.00

And the record shows that Waters & Waters made no demand,—presented no bill—made no charge—for additional amounts on account of services in this Court. The allowance, therefore, of \$2500.00 was and is wholly improper and unauthorized, for the following reasons, viz:

First. There is no evidence to support it.

Second. The same is wholly unjust and unreasonable.

Third. Under section 723 of chapter 182, Laws 1909, as construed by this Court in the case of McClure vs. Scates, 64 Kan. 284, the allowance of an attorney's fee to the Mill Company, as an item or element of damage, is in violation of the Constitution of the United States, and denies to this defendant the equal protection of the law, and deprives this defendant of its property without due process of law. That section 723, as heretofore construed by this Court, is unconstitutional and void; that the Commissioner has found and determined that the mandamus proceeding was instituted to enforce a private right, and not a statutory duty, but only a self-imposed duty on the part of the defendant; and there is no claim made or evidence offered proving, or tending to prove, such malice or fraud on the part of the defendant which would entitle the Mill Company to recover exemplary or punitive damage.

Fourth. Because there is no evidence in the record proving, or tending to prove, that the Mill Company has paid, or in any manner obligated itself to pay, said sum of \$2500.00, and it has therefore sustained no damage in excess of the sum of \$250.00, paid to Waters & Waters by reason of such proceedings in this Court.

Fifth. Because it appears conclusively from the evidence that the Mill Company has incurred no obligation to pay, and is not liable to Waters & Waters for, any compensation in excess of what has been paid, or what may be recovered by them from the defendant Company, and that, if it shall finally be held in this proceeding that the defendant is not liable for attorneys' fees, the said Mill Company is

not liable to said Waters & Waters for any amount in excess of what has been paid; and said Mill Company has therefore sustained no damage by reason thereof, and the Commissioner has found that: "It is a fair conclusion, from the evidence, that the attorneys will claim the full amount, and will accept whatever amount that shall be determined by this Court in this proceeding to be a reasonable compensation for their services in the case, and allowed as part of the damages"; but has not found, and there is no evidence to justify a finding, that the Mill Company expects to pay, or is liable or under any obligation to pay, any amount in excess of what may be allowed herein.

Sixth.

The items or claims numbered "tenth," "twelfth," "thirteenth," "fourteenth," and "fifteenth" should have been disallowed, and defendant moves that the same, and each thereof, be stricken out and disallowed, for the following reasons, viz:

First. There is no evidence in the record to support the same, or any thereof, as either just, lawful or reasonable.

Second. Under section 723 of chapter 182, Laws of 1909, as construed by this Court in the case of McClure vs. Scates, 64 Kan. 284, the allowance of said items and claims, and each thereof, to the Mill Company, as an item or element of damage, is in violation of the Constitution of the United States, and denies to this defendant the equal protection of the law, and deprives this defendant of its property without due process of law. That said section 723, as construed by this Court, as aforesaid, is unconstitutional and void, and in conflict with the Constitution of the United States.

Third. Because this Court had and has no jurisdiction, power or authority to consider, determine or award to said Mill Company any item, claim or demand for alleged damage which it is claimed accrued after December 24th, 1906, when this cause, and all proceedings connected therewith, was removed into the supreme court of the United States, by proceedings in error duly and properly instituted therein, under and in pursuance of the Federal Judiciary

Act, (U. S. Comp. Stat. 1901, Vol. 1, secs. 999, 1000, 1003, 1010) and in strict compliance therewith. That said defendant, on December 24th, 1906, executed a bond to the Mill Company in the sum of \$20,000.00, that it would pay to said Mill Company all damages which it might sustain by reason of such proceedings in error, if the same were not prosecuted to effect, and without unnecessary delay. That, by virtue of such proceedings, this Court lost all jurisdiction of this cause, except to carry into effect its final judgment, of date December 8th, 1906, and enter the mandate of the Supreme Court of the United States.

Fourth. It appears conclusively from the evidence that the Mill Company has paid to Waters & Waters, and to Charles Blood Smith, all attorneys' fees which it was bound to pay, by virtue of any contract, express or implied, and that the additional attorneys' fees claimed and allowed by the Commissioner, as damages, are to be paid by the Mill Company to its attorney only in event the same are

allowed as damages against the defendant. The Commissioner finds: "That no agreement has ever been had between the Mill Company and any of the attorneys as to the amount of their compensation; that neither of the attorneys has at any time entered on his books a charge against the Mill Company for services rendered, nor have they informed the Mill Company of the amount intended to be charged; nor have they determined in their own minds any definite amount intended to be charged; and thereon the Commissioner concludes that: "It is a fair conclusion, from the evidence, that the attorneys will claim the full amount, and will accept whatever amount that shall be determined by this Court in this proceeding to be a reasonable compensation for their services in the case, and allowed as part of the damages."

Fifth. It appears conclusively from the record that the Mill Company is not in good faith attempting to recover attorneys' fees as an element of its damage, upon the theory that there exists any liability on its part for the same, or that it has been damaged to that extent, but it is simply permitting the use of its name in this proceeding, to the end that its attorneys may have what is recovered; but the Mill Company will not sustain any damage or suffer any loss if
95 its attorneys do not win in this speculative venture.

Seventh.

There is no warrant or justification for the item numbered "eighteenth," of \$160.00, and not a scintilla of evidence that such expense was incurred at the instance of defendant Company, or that such expense was incurred in the prosecution of said suit.

Eighth.

The twenty-first claim of \$30.00, allowed is unjust, and wholly unwarranted by any law, custom or usage, and the allowance of the same denies to the defendant the equal protection of the law.

Ninth.

The evidence demonstrates that the Mill Company, during all the time covered by this controversy, (September 1st, 1906, to April 1st, 1907), and several years before and subsequent, was a member of and an active participant in a combination of millers in Southern Kansas, Oklahoma and Texas, that had for its purpose and object the control, restraint and monopoly of the price of wheat, corn and flour. All of the grain purchased by the Mill Company,—all of the flour produced at its mill,—and shipped out, was purchased, handled and sold in subordination to such combination and trust. Every item of damage allowed by the Commissioner connected with the operation of said Mill is tainted with the prices fixed, and surrounded with the limitations and restrictions of the combination and trust to which the Mill Company was a party. The amount allowed by the Commissioner, as items or elements of damage, is and must be, if sustained by this Court, a reward and premium for a conceded, unblushing and notorious violation of the Anti-Trust Laws of Kansas,

and the Acts of Congress prohibiting such violation; and the conclusion of the Commissioner is not supported by the evidence, and is contrary to law, and the facts appearing to the Court, the whole proceeding should be dismissed.

Tenth.

96 The defendant objects and excepts to each item allowed by the Commissioner, as an element of damage recoverable herein, for the special reasons hereinbefore assigned, and because each item allowed is not supported by the evidence, and is contrary to the evidence, and is unwarranted by and contrary to law; and, in the allowance of each item, the defendant has been denied the equal protection of the law, and to affirm the same will deny to this defendant the rights guaranteed by the Constitution of the United States; and thereon defendant moves that said report, as to each item allowed, be set aside and disaffirmed.

B. P. WAGGENER,
Attorney for Defendant.

Endorsed: 15167. Larabee Mill Co. vs. Mo. Pac. R'l'y Co. Exceptions to report of Referee and Motion to set aside. B. P. Waggener Att'y for Def't. Filed Feb. 8, 1911. D. A. Valentine, Clerk Supreme Court.

97 Be it further remembered, that afterward, on the 9th day of February 1911, there was filed in the office of the clerk of the supreme court of the state of Kansas, the exceptions of the plaintiff to the report of the Commissioner, and its motion for final hearing, which exceptions and motion are in the words and figures as follows, to-wit:

98 In the Supreme Court of the State of Kansas.

No. 15167.

THE LARABEE FLOUR MILLS COMPANY, Plaintiff,

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Motion for Final Hearing on the Report of the Commissioner.

The plaintiff moves the court to set a time for the hearing of the report of the Commissioner, as to all exceptions taken thereto, by either party, as to confirmation of parts of the same and for judgment and execution thereon; and that the fee of the Commissioner may be fixed; and that a time may be fixed for the filing of briefs of each party.

J. G. WATERS,
J. C. WATERS,
CHAS. B. SMITH, &
JOHN F. SWITZER,
Attorneys for Plaintiff.

Endorsed: No. 15,167. In the Supreme Court of The State of Kansas. The Larabee Flour Mills Company, Plaintiff, vs. The Missouri Pacific Railway Company, Defendant. Motion for Final Hearing on the Report of the Commissioner. Waters & Waters, Rossington & Smith John F. Switzer, Attorneys for Plaintiff. Filed Feb. 9, 1911. D. A. Valentine, Clerk Supreme Court.

99

In the Supreme Court of the State of Kansas.

No. 15167.

THE LARABEE FLOUR MILLS COMPANY, Plaintiff,

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Before Hon. H. C. Sluss, Commissioner.

Exceptions Taken to the Findings of Fact and Conclusions of Law of the Commissioner by the Plaintiff.

I. The plaintiff excepts to the disallowance of the 5th claim for damages to plaintiff as contrary to the evidence and opposed to the law, and asserts that under the evidence and the law the claim should have been allowed.

II. The plaintiff excepts to the disallowance in part, of claims 9, 10, 12, 14 and 15, for attorney fees of Waters & Waters, Rossington & Smith, John F. Switzer and C. G. Webb, and asserts that under the evidence and the law, these claims should each of them have been allowed in a larger amount.

And the plaintiff files with the Honorable Commissioner these exceptions that they may be embraced in or accompany with reference, his report made to the Supreme Court.

WATERS & WATERS,
ROSSINGTON & SMITH,
JOHN F. SWITZER,

Attorneys for Plaintiff.

(Endorsed:) No. 15,167. In the Supreme Court of The State of Kansas. The Larabee Flour Mills Co. Plaintiff, vs. The Missouri Pacific Railway Company, Defendant. Exceptions to the findings of fact and conclusions of law of the Commissioner, by the Plaintiff. Filed Feb. 9, 1911. D. A. Valentine, Clerk Supreme Court. Waters & Waters; Rossington & Smith, John F. Switzer, Attorneys for Plaintiff.

100 Be it further remembered, that on the same day, to-wit the 9th day of February, A. D. 1911, the same being one of the regular judicial days of the January 1911 Term of the supreme court of the state of Kansas, said court being in session at its court room in the city of Topeka, the following proceeding among others was had and remains of record in words and figures as follows, to-wit:—

101 In the Supreme Court of the State of Kansas, Thursday, February 9, 1911.

No. 15167.

THE LARABEE FLOUR MILLS COMPANY, Plaintiff,
vs.
THE MO. PAC. R'L'Y Co., Defendant.

Journal Entry.

Now on this 9th day of February, 1911, the plaintiffs appeared by their attorney J. G. Waters, and the defendant by its attorney, B. P. Waggener, and it appearing that the Commissioner, H. C. Sluss, has filed his report, with findings of fact and conclusions of law, together with the evidence and bills of exception, and that plaintiffs have filed exceptions to part, and motion to set aside part, and that defendant has filed exceptions to said report, and motion to set same aside, and that the Commissioner has filed application for allowance.

And it further appearing that all of the evidence taken before the Commissioner was abstracted by the plaintiff, and counter abstract duly filed by defendant, in compliance with rule No. 5 of the court,—which abstracts have been returned and filed with the clerk.

It is therefore ordered by the Court, by and with the consent of all parties, that all of said matters be set down for hearing at the June sitting of the Court, and to be heard on said abstracts and the report of the Commissioner,—the plaintiff, if desired, to file and serve supplemental abstract on or before April 1st, 1911, and the defendant to file and serve supplemental abstract, if desired, on or before May 1st, 1911.

It is further ordered that plaintiff shall have until April 1st, 1911, to serve brief on defendant's attorney, and defendant to have until May 1st, 1911, to serve brief on plaintiff's attorney.

102 Be it further remembered, that on the 24th day of March

A. D. 1911 there was filed in the office of the clerk of the supreme court of the state of Kansas the brief and abstract of the plaintiff, which brief and abstract are in the words and figures, as follows, to-wit:

103 Filed Mar. 24, 1911. D. A. Valentine, Clerk Supreme Court.
No. 15167.

In the Supreme Court of the State of Kansas.

No. 15167.

THE LARABEE FLOUR MILLS COMPANY, Plaintiff,
vs.

THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Brief of Plaintiff on Report of Commissioner and on Plaintiff's Motion to Confirm a Part, on Its Exceptions to a Part, to Allow a Sum for his Fees, and on Plaintiff's Motion for Judgment on Such Report.

Joseph G. Waters, John C. Waters, Charles B. Smith, John F. Switzer, Attorneys for Plaintiff.

104 In the Supreme Court of the State of Kansas.

No. 15167.

THE LARABEE FLOUR MILLS COMPANY, Plaintiff,
vs.

THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Brief of Plaintiff on Report of Commissioner and on Plaintiff's Motion to Confirm a Part, on Its Exceptions to a Part, to Allow a Sum for his Fees, and on Plaintiff's Motion for Judgment on Such Report.

The Commissioner has filed his report and accompanying such report is the testimony taken by him and his findings of fact and conclusions of law.

As to the items of damages submitted to him, exception is taken to his non-allowance of the fifth claim which was for loss of profits of the mill by reason of inability to grind corn and market corn products, caused by the suspension of the transfer service for 117 days at \$100.00 per day and aggregating \$11,700.

105 The one ground on which he declined, stated in his own words, is, "that the evidence is too indefinite and uncertain, based too largely upon estimate, opinion and assumption to justify a finding that there was a loss of profit by reason of inability to grind corn, or if there was a loss how much it amounted to, and I find the claim not proven."

This Court has in several cases decided that profits might be recovered on much less testimony than the plaintiff introduced; and if these decisions continue to be the law, the Commissioner was, as we think, wholly unjustified by the exclusion of this claim. We

first desire to call the attention of this court to its decisions, and to then follow thereafter the testimony taken from our abstract in relation to the proof we presented to substantiate this claim.

In the case of *Hoge v. Norton*, 22 Kan. 374, this Court held where cattle had been taken from their range and put on a range where grass and water were poor, and owing to the removal and inferior care, failed to make the growth in weight which cattle kept as they had been during the winter would ordinarily during the time of such detention make if left upon the range to which they were wonted free, from worry and with the abundance of grass and good water which existed on the first named range: Held, that, though they do not lose in weight during such detention, the failure to make the ordinary and expected increase in weight is a gain prevented, for which the owner is entitled to compensation.

Judge Brewer, in that case, said: "It is not always easy to draw the line between profits that are a legitimate element of compensation, and those that are too remote, contingent, or uncertain. The old idea that profits were never recoverable, was long since exploded; and now, even in actions on contract, it is said that they may be recovered when proximate and certain. 'The general rule is, that the party injured by a breach of contract is entitled to recover all his damages, including gains prevented as well as losses sustained, provided they are certain, and such as might naturally be expected to follow the breach. It is only uncertain and contingent profits, therefore, which the law excludes'. *Griffin v. Colver*, 16 N. Y. 489. Now it appears from the testimony that cattle kept through the winter as these cattle were, do not ordinarily during such time increase any in weight, but are in good condition for summer feeding, and if kept where they are wonted, and free from worry, and where grass and water are abundant and good, will, during the summer months gain in weight about a certain amount; that during the time when the increase in weight is expected, these cattle were driven away to a new range, exposed to worry, and where both water and grass were limited and inferior; and at the end of their detention they were returned to the owner, not, it is true, deteriorated in value or lessened in weight, but without having made the ordinary increase in weight and value. It is a case of gain prevented, rather than of loss sustained, and the questions are, whether such gain prevented is proximate and certain—i. e., directly the result of the removal and inferior care—and the amount thereof susceptible of reasonably certain measurement. Both these questions the jury, by their verdict, answered in the affirmative, and we cannot say that the testimony did not fully warrant the answers. Of course absolute certainty is not attainable, as in casting up the figures of an account; but nevertheless there are certain laws of feeding and growth well understood among cattlemen, and whose results work out with sufficient certainty for business calculations and judicial investigations. The raising of cattle for market has been an extensive and oftentimes profitable business in this state; and it would be strange if one would wrongfully take

from the owner a herd of cattle, remove them to a poorer range, feed them on inferior food, and so treat them that during the growing season they do not grow at all, and then at its end return them, saying, as did the unfaithful servant in the parable who returned the single talent without increase, 'Lo! there thou hast that is thine,' (apply this to the case at bar); "and still be under no liability to respond in damages to such owner. We do not think the law so deficient. It seems clear that the owner is damaged, that the damages may be determined to a reasonable certainty, and that the wrongdoer is bound to make good the damages.

"In *Sewall's Falls Bridge v. Fisk*, 3 Foster (N. H.), 171, it appeared that the plaintiff's toll-bridge was carried away, through the fault of defendants, and the loss of tolls during the time reasonably necessary to rebuild was adjudged one element in the damages recoverable. In *Lacour v. The Mayor*, 3 Duer, 406, the plaintiff's manufactory was injured and compelled to stop running, through the fault of the defendant, and the profits which would have been realized during the period of necessary suspension were recovered. See also *James v. Adams*, 8 W. Va. 568; *Hanover Rld. Co. v. Coyle*, 55 Pa. St. 396; *Pa. Rld. Co. v. Butler*, 55 Ind. 335; *Pa. Rld. Co. v. Dale*, 76 id. 47; *Albert v. B. S. Rld. Co.*, 2 Daily, 389; *Moore v. Frost*, 56 Ga. 188; *Morey v. King*, 49 Vt. 304. As this item of damages was recoverable, it was a matter of proof, and we think the testimony offered to prove it legitimate and competent."

In the case of *Brown v. Hadley*, 43 Kan. 271, this Court decided that the loss in the increase of cows is such fair and reasonable profit arising from the use of the cows, as the experience of dairymen in that locality shows can be estimated with reasonable certainty.

This Court there said, "We have no doubt but that the experience of dairymen can furnish estimates of the profits of cows kept for that purpose, that can be relied upon with the same degree of certainty that attends the result of all the other ordinary business of life."

In the case of *Land Co. v. Lincoln*, 56 Kan. 145, where an established business moved to a new location on an agreement that the railroad should be built to it, and it never was built, this Court held that loss of profits of the established business was properly taken into consideration. *Gas Co. v. Bailey*, 77 Kan. 296; *Rld. Co. v. Thomas*, 70 Kan. 409; *Enlow v. Hawkins*, 71 Kan. 633.

In this case there was every element proved that was necessary to recover. The Commissioner held there was no testimony. In a conflict of testimony, he may decide, and exercising the office of a trier of fact like a jury, it might in this Court be considered final; but whether it was a jury or Commissioner that found there was no evidence whatever, if this court finds there was, such a finding could not be supported, for that is the prerogative of a court.

The greatest grievance and claim was this item: It was proven to be the most disastrous to the mill. The mill owner knew his business; had transacted it for years; he knew the corn crops of previous years; he gave the capacity of

his mill, he knew what the corn crop was for this particular year, he knew what his own elevator in same vicinity was earning, declared he knew what the profit was, and on the one and only ground that there was no proper testimony, rejected this claim. The Larabees feel aggrieved at this decision and desire us to press it on this Court as a matter that involves the greatest injury to them, which they have suffered by the wrong of the company and which we believe they have abundantly shown by the testimony. On this point we have taken the testimony stated in our abstract filed before the Commissioner and have called attention to the page of such abstract where the testimony may be found. Here it is:

F. D. LARABEE: Other than this transfer track had no other means of communication with that track; we had to depend on teams; I was general manager of the mill and conversant with its business; the mill had been built about 8 years; it did a general milling business; we ground wheat and corn meal and corn chops; corn crop of 1906 had not yet matured when the transfer was stopped; it was a good crop; I know of no year when we did not have a good crop; it was a better crop than previous year; we had a large corn business and generally to the extent of our capacity; that had been our experience in previous years. (A. p. 6.) I knew what our profits were approximately from day to day and from year to year; I know what our profits were from the mill at the time of these various shut down or *days*. (A. p. 7.) We had a corn grinding apparatus at the mill, of approximately fifty thousand pounds of corn a day; it was our custom and we always had been able to sell a large amount of ground corn and corn chops; the stoppage of the transfer left our two loading docks at the mill so congested with flour that we could handle nothing but flour and wheat and this absolutely prevented the mill from doing a corn business; we could not possibly get teams to the (A. p. 8) door to load them; we had no facilities; that was all we could keep going; if we had had cars along the loading platform, that would have obviated the matter; the shut down of the transfer track absolutely prevented our handling any corn; as the manager of the mill, and conversant with its business, whenever the demand was favorable we ran our plant to its capacity; and this, in different years, varied; unfortunately this year, we were denied the privilege proved to be one of the best corn years ever seen; we had an elevator that was going and the profits were the greatest we had ever met in the corn business for that year; we had no opportunity to do any corn business; the shut down occurred before the crop was matured; and it continued until the corn crop was gone; we had an experience of eight corn seasons; in order to do a corn business we had to haul corn and we had no facilities to do that; as a mill owner and conversant with the situation, we could have run to the capacity of our corn facilities that year; had we the facilities which the Missouri Pacific denies us, we could have kept our main plant going; we know this from our experience in the corn business; with the elevator we had on the track and from the orders we received in the west which we could not supply; based on our established business, through these years, our reasonable and

(A. p. 9) expected profits would not have been less than ten cents per hundred and from that up to fifteen cents; we shipped corn that year from our north elevator and on a single car we made as high as \$125.00 a car; the elevator was one mile from the mill at Stafford; the same market as the mill; got corn for the elevator from the Stafford territory; the capacity of the mill for corn was a hundred thousand pounds a car a day; I estimated the profits at the north elevator, and the occasional car we could get out from the mill, and from the demand and prices that were offered us in the west, is the

base of my calculation of the profits we would have made by
 114 this corn business and from our past business; we could ship or sack a hundred thousand pounds a day; and the lowest price we would have been obliged to have taken, that fall, would have been about ten cents and from that up to fifteen; my answer is based upon the several years' business prior to that up to the time of the stoppage of the transfer, and what we did afterwards; I think ten cents a hundred is as low as you can make it. (A. p. 10.) Corn crop ready in November figured profit on corn products, meal and chops; ten cents is not the maximum profit; our market for corn is in western Kansas, Colorado, New Mexico and Arizona; from the time of the shut down to the time of the resumption of the track service, the mill was run to its capacity with the aid of teams except on the muddy road days; did not run corn mill to its full capacity because the flour accumulated (A. p. 11) to such an extent we could not get our corn out of the mill; we could not have made additional openings in the mill; there was not room on the loading side of the mill and the other side passes the dump; the office was at one end and there was no room at the other end; were congested inside the warehouse; we had no place to pile corn there; we could not get the teams

up to get the wheat products fast enough; the claim for damages
 115 on account of the corn from November 1st, 1906, 117 days, is based on both the actual milling and grinding of corn and on the basis of shipping unground corn; we have ground corn to the maximum capacity for several days at a time; did not run it at full capacity for 117 days; this fifth claim for corn is based on maximum capacity but not maximum profit. (A. p. 12.) The statement I furnished for the 117 days is correct; it did not include any day we did not run; from the business we did and from my experiences of it, I believe we could have run this plant to its full capacity each day of one hundred thousand pounds of corn; from what I know of the business that year; it was the best corn year we had ever seen up to that date; it was a fine crop; the occasion for the demand was they were short of feed in the south west; there was no effort we did not make; we did the best we could; I did all in my power to get the switching service renewed.

G. S. BENNETT: Am in milling business at Sylvania; was acquainted to some extent with market conditions in this locality in November and December, 1906, and January, 1907; with reference to milling products of corn; it was largely ground into chops; there was a great demand in the west and there was a shortage of cars; we used stock

cars and had to sack our stuff; we were taking care of our
116 entire outfit; the market was largely in western Kansas; we
shipped a good deal to Colorado; we were getting a profit on
corn products of about thirteen cents a hundred; the demand was
greater than we could supply; it was in November, December, Jan-
uary, February, not so much in March; about four months in the
fall and winter of 1906 and 1907 there was an extraordinary demand
for chop feed.

J. A. WHITEHURST: Milling business until a year ago at Sylvia;
11 miles from Stafford; was a competitor of all the mills in that
vicinity and operated in same territory both as to wheat and corn;
(A. p. 14); was acquainted with the situation all around there at
that time; it was part of my business and in a general way was con-
versant with the operation of the Larabee Mills; they had a large
flour mill, 700 or more barrels; they had a much larger corn plant
than I did; it was a growing concern all the time I knew it; we had a
good corn crop in that vicinity; probably the best; as a milling year
the best year we ever had; the demand for corn was splendid; the
general trend of profits for the mill for corn that year was the best I
ever had; I would say a reasonable profit was fifteen cents a hundred;
we shipped over a hundred car loads of corn products in three months

and our net profit was twelve or thirteen cents a hundred;
117 our profit last year and the year before that was ten cents; the
common elevators did not have sacking facilities and could
not get out their stuff; the mills that had sacking facilities had all
they could do; it was hardly a question of what they would give for
it; we could get almost anything we asked for it; we have sold cars
that made as much as \$140; they were feeding and taking care of a
lot of stock; we sold to merchants; feeders got it, too, but my business
was with merchants; I thought they could have made fifteen cents,
(A. p. 15); did not compare prices with Larabee; had no arrange-
ment as to what I would pay for corn or wheat; or where I was to
get my corn; or where I would sell my products.

F. S. LARABEE: Am banker and miller; am partner in Larabee
Mills; was intimate with the mill and its business; I know intimately
how it was fixed for wheat and corn; I had control of its finances;
it was economically handled, (A. p. 16); at that time there was
great volume of corn business thrown to the mills, because of a short-
age of box cars; elevators did not have sacking facilities; we were
able to sack and ship it in stock cars; the mills had practically a
monopoly of the business; corn crop much more than we had before;
demand seemed large to us; done business but not of that
118 volume; I knew through my banking connection that we had
a good corn crop; (A. p. 17); did no corn business practically
that year, (A. p. 18).

JOHN STEPHENS: Am superintendent of Larabee Mills; have been
with mill ten years; while it operated at Stafford; I know the opera-
tion of its business and am familiar with its business and its ma-
chinery; they had a corn plant which we were running making about
100,000 pounds of chop feed, that is, our full capacity; then we had
sacking apparatus, sacked corn, and could load it in stock cars; had

every facility for handling corn, (A. p. 20). We had all facilities for shipping corn; we could get stock cars; we had sacking supplies and could sack corn and load these cars; had this corn plant previous years; I put in another extra sacking board to look out for this large crop that was coming; we were in fine condition to do a corn business when it started in November, 1906, to extent of our capacity; we could make 100,000 pounds of corn chop and handle some corn besides; we did not have a switch; that was the reason we had to use teams; it is a mile and a quarter to the Santa Fe and to the switch track it is a quarter of a mile; I remember the time that the mill shut down; we had rains and bad roads and that was the cause of the shut down; I know the mills and their up-to-date features,

(A. p. 21); the mill was one of the latest machines built; 119 ready for trade; as a miller of experience, would say the mills were so situated as to be operated economically in the manufacture of flour and all these kind of things and had all the appliances; the corn crop of 1906 was a very good crop; a little more than the year before; and year afterwards not quite so good; we had grain for the last year; there has never been any time when we had to shut down the mill for getting wheat, (A. p. 22).

F. S. LARABEE: If it had not been for the Santa Fe our mill would have been bankrupt for lack of service on the Missouri Pacific; I will say further we loaded every car that the Missouri Pacific would furnish us; it would not furnish us cars; we were glad to get cars at any time; our demands were constant; the Missouri Pacific brought to our mill all loaded cars consigned over the Santa Fe; cars were loaded to their capacity; every car went back loaded, (A. p. 28); when I speak of doing no corn business on account of lack of service, I mean lack of service on the Missouri Pacific, (A. p. 29).

F. D. LARABEE: We could not load the corn, if we had got it, and we could have loaded the corn if we had got the car service; we handled six or seven cars a day; I think we would base the profits upon the profits of the preceding year, relative capacity might have something to do with the progress; in fall or winter of 1905, 120 we increased the capacity 200 barrels, (A. p. 30). We arrived at \$75 a day profit each day in the corn business by estimating the volume of business we could do, and the profit which we knew was in the business at that season; it was based partly on experience, because we do some corn business which didn't go through the mill; the statement is not exactly an estimate or guess because we had some experience in corn business during that season and knew what the profits were; we handled corn independent of the mill from the elevator in Stafford; the mill was then being operated at its full capacity for flour business; we could not handle the corn stuff to and from the mill without the switching service which was denied us; because we couldn't get it to the loading docks to load it in the wagons; we could grind chop and feed and run the mill to its full capacity; and the expense incident to operating it to its full capacity was the expense incurred in hauling, (A. p. 47); I can tell the profit from my mill for the corn business for 117 days was \$75 to \$100 a day as it was known to me by investigation and

by being in touch with other mills, that the corn business for the mills located in that section was the best of any year they ever had known; each year governs itself now that year was a particularly good year; we did some corn business at our elevator; in fixing our profits of \$75 per day in the original statement, and \$100 in the amended statement, it was not entirely speculative, because we were in touch with conditions and we did a corn business; we had to estimate it some from what we could gather; we might have had years that would be just as good, but I don't remember one that was quite as good as that particular year; it was a business proposition to buy and sell the product; we never spent a dollar for hauling flour or stuff from or to the Santa Fe track we could get carried by the Missouri Pacific; we loaded all the Missouri Pacific cars they (A. p. 48) furnished us; we had a corn arrangement with our mill in which we ground corn and flour at the same time our capacity was 100,000 pounds daily; we had run it to its full capacity; the corn was in the country and obtainable by us; a very good corn crop; sufficient with the other mills to supply our mill to its capacity; corn was being shipped out frequently. (A. p. 49.)

This is the substance of the testimony on that claim. If the recovery of profits is justified in the two cases cited, there is nothing that should have caused the Commissioner to not allow this claim. There is no reason why it should have been denied. The Commissioner was extremely conservative all through; and without the suspicion of any criticism on the Commissioner, whom the writer has known a life time, and for every thing that is good and high and noble, he cannot but say, that all conservatism has a near horizon and but little of perspective. The stoppage of the mill, a great loss, and then, for the law to say that while an intelligent manager of it, who knows the past of his trade, who knows the crops, who knows the profits, gives the capacity of his mill and declares the loss, is not sufficient, is an injury without remedy and unjust.

II.

The Commissioner has seen proper to allow us as we are impressed, with a very small sum for attorneys' fees. The Commissioner says, speaking of the testimony of the witnesses: "I conclude that none of them had given the elements of the case such study and consideration as that this court would be justified in adopting the opinions of any of them as a basis for its judgment as to the value of the services of the attorneys in the case in the Supreme Court of the United States for the amount of which the Mill Company had become liable." He allowed John F. Switzer \$500 when claim was made for \$5,000 and testimony offered to show that it was worth it. The writer feels the injustice done to Mr. Switzer and that this allowance ought to be raised considerably. As to the other attorneys engaged in the case, New York lawyers would have had enlarged sums allowed them by their courts, and would have

expected them. Modestly, the writer cannot say more. The Commissioner has this further to say in regard to the attorneys' fees:

"I find that the attorneys will claim the full amount that shall be determined by this court in this proceeding to be a reasonable compensation for their services in the case and allowed as part of the damages."

"I further find that it is mutually understood between the Mill Company and the attorneys named, that whatever amount is recovered in this proceeding on account of fees and expenses of counsel will be paid by the Mill Company to and accepted by the attorneys as a full discharge of the liability to them." The import of this language is that the sums he has named are simply suggestive to this court; and if this is so, then there is no real impropriety to suggest to this Court that they should be somewhat increased and especially to Mr. Switzer. The attorney for the railway in his briefs, in every way in his power magnified this case and said this case involved the very integrity of the Nation; that there had never been a case of graver magnitude than this. To those who knew the distinguished attorney, they knew he believed this to be abso-

124 lutely true; that it was part of his conscience and learning as a lawyer; and when the proposition he asserted in the Supreme Court of the United States, that whenever a railway indulged to any degree in interstate commerce, that moment all jurisdiction of the forty-six American states, as to their legislatures, courts, railway tribunals and executives had ended, except as to the thing carried, and that they were then under the exclusive jurisdiction of the United States, they must take it, that he was serious in his position. He was the last man on the face of the wide earth to be so insincere as to announce this proposition for the felicity or ovation of any grand stand or the notoriety and fame that comes to the inventor of great things and the discoverer of weighty problems. Had he been successful, he would now rank as a new Morgan, a greater Rockefeller and a more splendid Carnegie. The writer cannot help but say this.

As to the remaining report of the Commissioner in his allowances and disallowances, we have no further word of exception or criticism. There never was a time but what the Commissioner was and is considered as the ablest of jurists, the very best of lawyers and of the highest character, and we desire to borrow from his decision in this case his words in deciding two propositions which will

125 be denied and argued against by the other side.

The first of these is, the membership of the Mills Company is a trust and monopoly club. This case went through to a final result without that matter in any way being an issue or in any way involved in it. The question was raised for the first time when it had been referred to the Commissioner on the question of damages.

The Supreme Court of the United States has decided that it is no defense to the action that a party was a trust or combination in violation of the trust law of the United States, unless such violation enters into and is a part of the cause of action; that a company which

is a combine and trust can foreclose a mortgage and sue on a note and it is no defense.

Bement v. National Harrow Co., 186 U. S. 70.

Connolly v. Union Sewer Pipe Co., 184 U. S. 544.

Loeb v. Columbia Township Trustees, 179 U. S. 472, 479.

Embrey v. Jemison, 131 U. S. 336, 348.

Distilling Co. v. Importing Co., 86 Wis. 352, 355.

Dennehy v. McNulta, 86 Fed. 825, 829.

The Charles E. Wisewell, 74 Fed. 802.

Strait v. National Harrow Co., 51 Fed. 819.

In the case of Barton v. Mulvane, 59 Kan. 317, this Court
126 says, as to section five of our own law: "We think, rather, that this provision was intended to apply where the unlawful arrangement, contract or interest was sought to be enforced or some step taken designated to promote the operation of the unlawful trust, combination or conspiracy." The Commissioner has this to say:

"The question is presented in this hearing that the Mill Company is not entitled to recover any damages in this proceeding for the reason that the Mill Company during the period in which the damages claimed arose, was a member of the Southern Kansas Millers Commercial Club; that this Club was an association of millers and the object and purpose of it was to control the price of wheat and flour, and prevent competition in the purchase of wheat and in the sale of flour; and included in its membership, and allied associations, substantially all the persons engaged in the milling business throughout Kansas, Oklahoma and Texas; and was an organization in violation of the anti-trust laws of Kansas."

"A large amount of evidence was taken to prove this charge. An abstract of this evidence is contained in an abstract of the evidence in the case prepared by the Pacific Company and printed and furnished to the Commissioner for his use; the abstract of the evidence on this question being shown from pages 147 to 200 inclusive, and is returned and filed herewith as Commissioner's Exhibit.

"I find that the Pacific Company's abstract of the evidence applicable to this question is a fair and full one, and it is
127 adopted as the Commissioner's analysis of the evidence."

"I find that it is not proven that the Southern Millers Commercial Club was at any of the times covered by the claim for damages in this proceeding, an association for the purpose to create or carry out restrictions in trade or commerce, or in the full and free pursuit of any business authorized by law; to increase or reduce the price of grain or flour or mill products; or to prevent competition in the manufacture, transportation or sale of flour, or in the purchase and transportation of wheat; or to fix any standard or figure whereby the price of grain or of flour or mill products to the public should be in any manner controlled or established, or to bind the members thereof not to sell, manufacture, dispose of or transport flour or mill products below a common standard figure, or to in any manner keep the price of grain, flour or mill products,

or the transportation of any of the same at a fixed or graded figure; or to establish or settle the price of any article or commodity or transportation between themselves and others, or to preclude free and unrestricted competition among themselves or others in the transportation, sale or manufacture of any such article or commodity.

"I find that the performance of the switching service which was the subject matter of this action, was not any part of the purpose of the organization of said Club; and that the performance of the switching service demanded by the Mill Company of the Pacific Company in this action, was not a part of or necessary to, the carrying out of any of the purposes of the organization of the Southern Kansas Millers Commercial Club."

"I conclude that the judgment of this Court awarding the peremptory mandamus in this action, is an adjudication adversely
128 to the Pacific Company of every question that was, or might have been, considered by this Court, whether presented by the Pacific Company in its return to the alternative writ of mandamus, or arising upon the suggestion of the Court itself, as a cause why the peremptory mandamus should not be awarded; and is an adjudication that the performance of the switching service demanded was a duty owing by the Pacific Company to the Mill Company, and that the refusal of the Pacific Company to perform that service was wrongful." Report of Commissioner, pp. 34, 35, 36.

The Railway Company contended or will contend, that the services rendered in the Supreme Court of the United States are not allowable. This is what the Commissioner decided:

"It is objected by the Pacific Company that these items cannot be allowed, for the reason that these were expenses incurred in a matter pending in the Supreme Court of the United States, and not in this Court; that the judiciary act of the United States requires that on allowance of a writ of error to that Court from the Supreme Court of a State, a bond shall be taken conditioned that the plaintiff in error shall answer all damages where there is a supersedeas, and where judgment is affirmed the Court shall adjudge to the respondent in error just damages for his delay: That there was a supersedeas in this case; that by reason of the provisions of the judiciary act this Court is deprived of all power to allow as damages in this proceeding any damage outlay or expense incurred as a result of the proceeding in error; that the only remedy of the Mill Company on the claims specified would be an application to the Supreme Court of the United States for their allowance, or by an action upon the super-
129 sedeas bond; and that the Supreme Court of the United States did allow the Mill Company \$20.00 as and for counsel fees in that court."

"Upon this objection I conclude:

"That the jurisdiction of this Court in mandamus is the creation of the Constitution and the Statutes of the State of Kansas."

"That this Court is the sole judge of what that Constitution and those statutes provide."

"That the jurisdiction of this Court in mandamus over persons within its jurisdiction, cannot be affected by Act of Congress."

"That the Judiciary Act does not and was not intended to affect the jurisdiction of this Court."

"That the jurisdiction of this Court in mandamus attaches upon the issuance of the Alternative writ, and the subject matter of the proceeding being the awarding a peremptory mandamus, that jurisdiction continues unabated, not only until the writ is awarded, but also until the writ is issued and obedience to it enforced."

"That the Alternative writ is a command of the performance of specified and prescribed duties; that return to the writ is a refusal to perform the duties prescribed; the judgment awarding a peremptory mandamus is a conclusive adjudication that such refusal was wrongful, and the act of the Court compelling compliance with the command of the alternative writ."

"That the damages comprehended by the Kansas Statute are the injuries sustained as the natural and probable consequences of the wrongful refusal to comply, and the expenses reasonably and
130 necessarily incurred in compelling compliance, with the command of the alternative writ."

"That the allowance of the writ of error did not operate to remove the suit from the Supreme Court of the State into the Supreme Court of the United States; its only effect was to bring up the record for purposes of review."

"The allowance of the writ of error did not operate as a supersedeas; the taking of the supersedeas bond brought about the supersedeas. The taking the bond, and the supersedeas itself in so far as it can be conceived of as a substantial act was the action of the Supreme Court of Kansas."

"I conclude that the objection should be disallowed and a claim for the reasonable compensation of the attorneys mentioned for their services in the case in the Supreme Court of the United States, and their reasonable and necessary expenses, should be allowed as part of the damages sustained by the Mill Company."

The Supreme Court of the United States had no jurisdiction of this case whatever; if it had had any, the Larabees would have been defeated, as in such case this Court would have had none; that is, if there was a federal or interstate matter involved, and there was not. That court had the right to hear the complaint and when it had heard such complaint, all it could do was to turn the Railway Company out of court and send it back to the court that had jurisdiction.

As to the amount to be allowed the Commissioner, we ask
131 that he be given Two Thousand Five Hundred Dollars, any way, for he has earned it.

Finally, we now submit the whole matter to this court, and respectfully ask that final judgment be rendered including costs, fees of Commissioner and damages and that execution may be ordered to be issued for their collection.

JOSEPH G. WATERS,
JOHN C. WATERS,
CHARLES B. SMITH,
JOHN F. SWITZER.

Attorneys for Plaintiff.

132 In the Supreme Court of the State of Kansas.

No. 15167.

THE LARABEE FLOUR MILLS COMPANY, Plaintiff,
vs.
MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Before the Hon. H. C. Sluss, Commissioner.

Abstract of Plaintiff of the Testimony Relating to the Damages.

Waters & Waters, Rossington & Smith, John F. Switzer, Attorneys for Plaintiff.

J. D. Houston, of Counsel.

133 In the Supreme Court of the State of Kansas.

No. 15167.

THE LARABEE FLOUR MILLS COMPANY, Plaintiff,
vs.
MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Before the Hon. H. C. Sluss, Commissioner.

Abstract of Plaintiff of the Testimony Relating to the Damages.

The plaintiff presents to the Commissioner the following abstract of the testimony, so far as it relates to the question of damages.

F. D. LARABEE: The traffic stopped Aug. 27, 1906, R., p. 9; since the stoppage we have continued the business over the Santa Fe by hauling the stuff over by team; it was absolutely important; a large volume of our business is over the Santa Fe and if we don't
134 get our stuff to their tracks we are going to lose a valuable trade; three-fifths of our business is on the Santa Fe, R., p. 14; it was the 29th of August the transfer was stopped, R., p. 16; we have examined the books to time of stoppage, we had 2505 out-bound cars of flour and stuff; wheat was but little part of it; the in-bound was 579 cars of wheat and corn, 80 cars flour, 40 cars fuel oil and 150 cars coal; of the out-bound 488 were for Kansas points and 2017 to outside points; the wheat and corn all came from Kansas; so with the oil; the coal came from Kansas and Colorado, R., p. 16; other than teams would have had no other means of supplying custom on the Santa Fe; had got to haul it in absence of the transfer track, R., p. 18; had a lucrative and increasing trade on the Santa Fe; it was on the increase at time of stoppage; the expenses by team up to the 27th of this month (November) is \$535.85, R., p. 19; it consists of wages we pay teams and men, men \$1.50 and teams \$3.00 per day; we load at mill, haul to Santa Fe and two men stow it away; haul a mile; if switched the only expense would be \$2.00 per car;

this expense was necessary, made so by the stoppage of the transfer, R., p. 20; are now undergoing this expense from day to day, a loss of about \$21.00 a day, R., p. 21; sent for Waters, he came down;

we paid him \$75.00; we engaged him to bring this thing into
 135 court, no terms set; since the stoppage have been compelled to put in some of my personal time away from the mill; made two trips to Topeka and one to Hutchinson; went to Hutchinson to see Vandever & Martin, R., p. 23; paid them \$20.00 yesterday; my expenses and time were worth \$30.00; it was necessary in reference to this suit; brother went, it was necessary; two days and expenses worth \$30.00; if the transfer track were out we think our loss would be reasonably \$15,000, R., p. 23, and three-fifths of trade originating on the Santa Fe; paid \$22.00 for printing brief, R., p. 24; have lived in Stafford 20 years; a city of 1800; have two railroads, R., p. 37; we switched over this track six or seven cars a day in and out, R., p. 38; since transfer has been in, have got in 579 cars wheat and corn in a little over 3 years, R., p. 39; two-fifths of shipments are over the Mo. Pac. R., p. 54.

Mr. GARRIGUES: Examined record of car load shipments over Santa Fe from June 1903 to Oct. 1906, total 2556, of which 495 were to Kansas points and remainder outside, R., p. 141.

F. S. LARABEE: Owing to lack and failure to get cars on Mo. Pac. we have shipped over the Santa Fe and Frisco to Mo. Pac. points in

Mo. and southern Kansas; we had to reserve all the Mo. Pac.
 136 cars we can get to go to exclusive Mo. Pac. points; we prefer to give these shipments to the Mo. Pac. if we can; we have regular customers to whom we make shipments; most of our trade is country merchants; we have shipped to Ft. Scott, Joplin, and Mo. Pac. points that are reached by the Santa Fe and Frisco and have been compelled to get joint rates to take care of the business; that was not to avoid the Mo. Pac.; we could not get the cars, R., p. 207; the Mo. Pac. could have had this trade if it had furnished the cars, R., p. 208.

On November 3d, 1906, before any trial was had, the following testimony was taken at Topeka concerning attorney's fees:

L. S. FERRY: \$2500 in Supreme Court of Kansas and \$2500 further fee if carried to Supreme Court of U. S. According to question asked by Judge Doster think a thousand dollars would be reasonable. R., p. 216.

JOSEPH G. WATERS: Am an attorney; the Larabees paid me \$75.00 for going down to Stafford; they afterwards hired Waters & Waters; there was no sum agreed on; we claim we are entitled to reasonable compensation for our services, R., p. 217; we begun suit; made out the affidavit for writ as well as the alternative writ; the Mo.

Pac. applied for further time to answer which we resisted; it
 137 filed plea in abatement, setting up that the Supreme Court had no jurisdiction and that it was inter-state matter; we demurred to that plea; had it set for argument, R., p. 218; we made

examination of interstate commerce acts and decisions of the Federal courts and Interstate Commerce Commission; prepared a brief of 21 pages and made oral argument on trial; the court sustained our demurrer; the defendant then answered, setting up all that had been embraced in its plea, and other matters beside; we had case set for trial for November 9 and ordered the taking of testimony; we took testimony at Stafford Nov. 1st and 2d, are taking testimony in our office today; the case is still to be tried in the Supreme Court; we have devoted several days' time to the preparation and trial of this case; I do not testify as to the value of my own fees, R., p. 219.

E. D. McKEEVER: Think services in Supreme Court of Kansas worth \$2,500 and through the Federal Courts, think the whole business worth \$5,000, R., p. 224.

J. F. SWITZER: I should think \$2,000 or \$2,500 for the service in the Supreme Court of Kansas and in Supreme Court of U. S. \$1,500 more, R., p. 221.

J. J. SCHENCK: I think \$2,500 would be a minimum in Supreme Court of Kansas, R., p. 235, and a thousand more in Supreme Court of the U. S. R., p. 236.

138 A. B. QUINTON: I think \$2500 would be a fair fee in Supreme Court of Kansas and probably a thousand more in Supreme Court of the United States. R., p. 245.

F. D. LARABEE: Am partner with F. S. Larabee of mill at Stafford, R., p. 322; its capacity was 700 barrels; destroyed by fire in July 1907; the order prohibiting the switching was Aug. 26, 1906; mill burned July 4, 1907; the traffic had been resumed in April 1907; no agreement to resume; I told manager if service was resumed we would not be damaged any further, R., p. 323; mills are on spur of Mo. Pac. on north side; one mile from Santa Fe track and about $1\frac{1}{4}$ miles from the place on Santa Fe where we had to transfer; other than this transfer track had no other means of communication with that track; we had to depend on teams; I was general manager of the mill and conversant with its business the mill had been built about 8 years; it did a general milling business, R., p. 324; we ground wheat and corn meal and corn chops; corn crop of 1906 had not yet matured when the transfer was stopped; it was a good crop; I know of no year when we did not have a good crop; it was a better crop than previous year; we had a large corn business and generally to the extent of our capacity; that had been our experience in previous years; as to the fourth claim for damages, for a complete shut down of the mill, one-half day in November 1906, and also for December 1st, 3d, 4th, 24th and 26th, 1906, January 1st, 2d, 12th, 28th, 29th and 30th and February 27th and 28th, 1907, made necessary in consequence of muddy and bad roads, making it impossible to (R., p. 325) operate mill and transfer products by team and labor which would have been wholly obviated if transfer service had been given, for $13\frac{1}{2}$ days at \$250.00 per day

making a total of \$3375.00; I will say that owing to the fact we could not get Santa Fe cars at the mill, and the Mo. Pac. were unable to furnish any cars during that period, we were forced to shut the mill down, because our store room became filled up and whenever we run into a day that we could not haul, naturally the mill had to stop; muddy roads prevented it, R., p. 326; the ordinary rainfall produces muddy roads; ever since the mill has been there we had periods of muddy roads; when the muddy roads came, we had to shut down; we got no relief from the Mo. Pac.; sometimes the mud prevented and sometimes the rain; it was a perishable product; we had to shut down; I knew what our profits were approximately from day to day and from year to year; I know what our profits were from the mill at the time of these various shut downs or days; the profit was

140 twenty cents a barrel on the flour at the lowest calculation; it was something over that; we would make 700 barrels a day, R., p. 327; our year's business showed a little more than that, and including these days that we were shut down; had a regular force at the mill, regular crew, clerks and officers; we had to keep them during these 13½ days; our daily expense at the mill during the days we were shut down was \$109.25 a day; we had to pay that; this expense was not all the expense the plant was to; it cost us \$50.00 a day to keep up our fixed expenses, such as taxes, interest and insurance, and items of that kind that did not enter on the pay roll; we lost over and above that, we lost nearer \$160.00 a day during these 13½ days of complete shut down, based upon our then and past business, than we did \$150.00 a day, R., p. 328, and these expenses we had to bear without profit during these 13½ days; we had a corn grinding apparatus at the mill, of approximately fifty thousand pounds of corn a day; it was our custom and we always had been able to sell a large amount of ground corn and corn chops; the stoppage of the transfer left our two loading docks at the mill so congested with flour that we could (R., p. 329) handle nothing but flour and wheat and this absolutely prevented the mill from doing a corn business; he could

141 not possibly get teams to the door to load them; we had no facilities; that was all we could keep going; if we had had cars along the loading platform, that would have obviated the matter; the shut down of the transfer track absolutely prevented our handling any corn; as the manager of the mill, and conversant with its business, whenever the demand was favorable we ran our plant to its capacity; and this, in different years, varied; unfortunately this year, we were denied the privilege proved to be one of the best corn years ever seen; we had an elevator that was going and the profits were the greatest we had ever met in the corn business for that year; we had no opportunity to do any corn business; the shut down occurred before the crop was matured, R., p. 330; and it continued until the corn crop was gone; we had an experience of eight corn seasons; in order to do a corn business we had to haul corn and we had no facilities to do that; as a mill owner and conversant with the situation we could have run to the capacity of our corn facilities that year; had we the facilities which the Mo. Pac. denies us, we could have kept our main plant going; we know this from our experience in the corn business; with the elevator we had on the track and from the

orders we received in the west which we could not supply; based on our established business, through these years, our reasonable
142 and expected profits would not have been less than ten cents per hundred and from that up to fifteen cents; we shipped corn that year from our north elevator and on a single car we made as high as \$125.00 a car, R., p. 331; the elevator was one mile from the mill at Stafford; the same market as the mill; got corn for the elevator from the Stafford territory; the capacity of the mill for corn was a hundred thousand pounds, a car a day; I estimated the profits at the north elevator, and the occasional car we could get out from the mill, and from the demand and prices that were offered us in the west, is the base of my calculation of the profits we would have made by this corn business and from our past business, R., p. 332; we could ship or sack a hundred thousand pounds a day; and the lowest price we would have been obliged to have taken, that fall, would have been about ten cents and from that up to fifteen; my answer is based upon the several years' business prior to that up to the time of the stoppage of the transfer, and what we did afterwards; I think ten cents a hundred is as low as you can make it.

Cross-examination, R., p. 333:

The last increase in the capacity of the mill was in 1904; at that time the switch track was put in; we employed from 12 to 16 teams in this transfer business, R., p. 334; level road, rather hard,
143 no sand; had been operating mill with this team transfer to its full capacity; all of these shut downs were on account of muddy roads; the record, I think, shows the shut down was for that purpose; McCord kept the record of it, R., p. 335; when we shut down the mill was unable to operate; part of the mill crew was paid full time; my salaried men, and possibly some laborers; we would pile the stuff up as long as we could; and their services were valuable to us; we made some repairs during the shut down, R., p. 336; there is no charge for Sunday; our market for flour was mostly from west of the Mississippi to Pacific coast; we made 3 cars of flour a day; our profits is figured at twenty cents a barrel on all grades; that is 700 barrels a day; the balance sheet for this identical year shows a profit of twenty cents, R., p. 327; it showed twenty cents profit on the number of barrels made; these sheets were burned with the mill, R., p. 328; corn crop ready in November figured profit on corn products, meal and chops; ten cents is not the maximum profit; our market for corn is in western Kansas, Colorado, New Mexico and Arizona, R., p. 339; from the time of the shut down to the time of the resumption of the track service, the mill was run to its capacity with the aid of teams except on the muddy road days, R., p. 341; did not run corn mill to its full capacity because the flour
144 products accumulated to such an extent we could not get our corn out of the mill; we could not have made additional openings in the mill; there was not room on the loading side of the mill and the other side passes the dump; the office was at one end and there was no room at the other end, R., p. 341; were congested inside the warehouse; we had no place to pile corn there; we could

not get the wheat products fast enough; we used hand trucks in loading wagons, and wheel trucks in loading cars, R., p. 342; capital invested in mill is \$180,000, employ as high as thirty men; a third laborers, R., p. 343; the claim for damages on account of the corn from November 1st, 1906, 117 days, is based on both the actual milling and grinding of corn and on the basis of shipping unground corn; we have ground corn to the maximum capacity for several days at a time; did not run at full capacity for 117 days, R., p. 345; this fifth claim for corn is based on maximum capacity but not maximum profit; we have produced 700 barrels of flour daily for weeks at a time, R., p. 346; our firm was a member of Southern Kansas Millers Association; Hunter of Wellington is President; I think we were members at all the times mentioned in these claims, R., p. 347; its object was not to control prices of flour; it was to disseminate information.

145 Redirect:

During this time we ground night and day, both; the warehouse was already congested in the morning; including the 13½ days we have ascertained and know the profits of the mill for that year; the 13½ days was expense but no profits; our profits last year was \$42,000, July 1, 1906, to July 1, 1907; the statement I furnished for the 117 days is correct, R., p. 348; it did not include any day we did not run; from the business we did and from my experiences of it, I believe we could have run this plant to its full capacity each day of one hundred thousand pounds of corn; from what I know of the business that year; it was the best corn year we had ever seen up to that date; it was a fine crop; the occasion for the demand was they were short of feed in the southwest; there was no effort we did not make; we did the best we could; I did all in my power to get the switching service renewed, R., p. 349.

Recross-examination:

We could not use the Mo. Pac. tracks to do it, R., p. 350; \$160 a day was our fixed charges; the profit that we lost was \$140 for the flour; we carried people during the 13½ days at \$109.25 a day; interest, insurance and taxes and such other items amounted to between \$50 and \$60 a day; it included my salary, R., p. 351, of \$250 per month, R., p. 352.

146 G. H. McNAIR: Live at Halstead, am miller and banker; lowest profit is twenty-five cents a barrel from my knowledge of the Larabee mills; we purchased from same market and worked same territory to great extent, R., p. 356.

Cross-examination:

I am member of the Southwest Millers' Association, R., p. 357; in shut downs the trained men are not discharged, R., p. 359.

G. S. BENNETT: Am in milling business at Sylvia, R., p. 361; was acquainted to some extent with market conditions in this locality in November and December 1906 and January 1907; with reference to milling products of corn; it was largely ground into chops; there was a great demand in the west and there was a shortage of cars; we used stock cars and had to sack our stuff; we were taking care of our entire outfit, R., p. 362; the market was largely in western Kansas; we shipped a good deal to Colorado; we were getting a profit on corn products of about thirteen cents a hundred, R., p. 363; the demand was greater than we could supply; it was in Nov., Dec., Jan., Feb., not so much in March; about four months in the fall and winter of 1906 and 1907 there was an extraordinary demand for chop feed, R., p. 364.

J. A. WHITEHURST: In milling business until a year ago at Sylvia; 11 miles from Stafford; was a competitor of all the mills in that vicinity and operated in same territory both as to wheat and
147 corn, R., p. 368; was acquainted with the situation all around there at that time; it was part of my business and in a general way was conversant with the operation of the Larabee Mills; they had a large flour mill, 700 or more barrels; they had a much larger corn plant than I did; it was a growing concern all the time I knew it, R., p. 369; we had a good corn crop in that vicinity; probably the best; as a milling year the best year we ever had; the demand for corn was splendid; the general trend of profits for the mill for corn that year was the best I ever had; I would say a reasonable profit was fifteen cents a hundred, R., p. 370; we shipped over a hundred car loads of corn products in three months and our net profit was twelve or thirteen cents a hundred; our profit last year and the year before that was ten cents, R., p. 372; the common elevators did not have sacking facilities and could not get out their stuff; the mills that had sacking facilities had all they could do; it was hardly a question of what they would give for it; we could get almost anything we asked for it; we have sold cars that made as much as \$140; Larabee I have caught cutting prices; we had no agreed prices, R., p. 373; they were feeding and taking care of a lot of stock; we sold
148 to merchants; feeders got it, too, but my business was with merchants; I thought they could have made fifteen cents, R., p. 374; did not compare prices with Larabee; had no arrangement as to what I would pay for corn or wheat; or where I was to get my corn; or where I would sell my products.

F. S. LARABEE: R., p. 375; am banker and miller; am partner in Larabee Mills; was intimate with the mill and its business; built originally in 1898; increased from time to time until we had 700 barrel mill; I know intimately how it was fixed for wheat and corn; I had control of its finances, R., p. 376; it was economically handled; at time of shutting off the transfer the mill was buying wheat sufficiently for us to grind, sufficient to make 700 barrels a day; it ran almost continuously; was running at its full capacity at the time they shut us off; we supplied the people; the domestic customers; demand greater in winter months than in the summer months; our regular customers

were calling on us heavier; in winter we bought flour from other mills to supply our additional orders, R., p. 377; before the shut down we had been making twenty a barrel; the mill cleared from July 1906 to July 1907 approximately \$42,000; it included these days of the shut off; I know the mill was shut down; it was shut down on account of bad roads and inability to get the stuff out, R., p.

378; there was only one way we could have kept the mill open 149 in spite of these muddy roads and that was to get more teams and send them quarter loaded; if switch track had been open we could have continued business; the force of men in the warehouse was larger than would have been for the night runs had piled up work and it had to be rehandled; could not load from packers when we were using teams; the night runs so piled it up in the warehouse that we had to employ men to lift it into the wagons; this was absolutely necessary; I engaged the firm of Rossington & Smith to assist in litigation in Supreme Court; no definite arrangement; they were to give what assistance they could and do all they could, R., p. 379; we should pay them not less than \$500 in any event and more as their services were worth; we had no idea of the magnitude the case would grow into afterwards; \$500 and a reasonable sum; at that time there was great volume of corn business thrown to the mills because of a shortage of box cars; elevators did not have sacking facilities; we were able to sack and ship it in stock cars; the mills had practically a monopoly of the business; corn crop much more than we had before, R., p. 380; demand seemed large to us; done business but not of that volume. Cross-Examination: Mill was in city of Stafford, R., p. 381; knew through my banking connection

that we had a good corn crop; working days at mill did not 150 include Sundays, R., p. 383; break downs are repaired Sundays; net profit for year preceding \$30,000 to \$40,000; did no corn business practically that year, R., p. 384; my brother was told by Waggener that they were going to have Judge Dillon, a lawyer of national reputation and we thought we should have additional counsel also; the fee of \$500 was not contingent on success; R., p. 386; think the \$500 has been paid them, R., p. 387; it was an oral agreement; in event the court would not allow Mo. Pac. to pay attorneys, I feel that we would owe them, R., p. 388; the case developed larger than we expected; they were to render what service was necessary, R., p. 389; we got \$205.00. (Mr. Waters: I received twenty dollars from Supreme Court taxed as (R., p. 390) costs.

WILLIAM KELLEY: In milling business at Hutchinson 500 barrel mill, only grind wheat; been in milling industry since 1883; at Great Bend 20 years, R., p. 392; I knew Larabee Mills at Stafford; they had a corn attachment; to a large per cent the territory for my mill and theirs is the same; we are competitors every where we go, R., p. 393; expenses are about the same; am familiar with the flour trade embracing Hutchinson, Great Bend and Stafford for November and December 1906 and January 1907; the profits vary a whole lot 151 from ten to fifty cents a barrel the same day; we some times have a surplus, R., p. 394; we sell it at a close figure; may be as low as five cents a barrel; the trade then was

in average condition; a reasonable profit is based on the ordinary operation of the milling business, R., p. 395; we were running and doing a nice business, R., p. 396; we shut down and wash boilers every Sunday; the profits are not standard and vary on account of freight rates, quality of wheat and business conditions; and depend on proper management, R., p. 397; there are numerous elements.

Redirect, R., p. 398:

I understand the mill at Stafford was properly managed.

G. C. WEBB: Am an attorney; have been for twenty years; gave Larabees advisory service, R., p. 400; I gave them advice what to do; as to the character of suit to bring; when to begin it; they took my advice just as was done; I think \$500 a reasonable fee.

Cross-examination:

The commencement of it was just before this suit; I have been consulted ever since; did not make charge on books; rendered bill for services two or three months ago; they have not paid me; Waters came down and I consulted him, R., p. 402; I was consulted on several occasions; the Mo. Pac. officials were at Stafford on two occasions wanting to make a settlement; I was consulted at these times:

I have been consulted for the last two years and a half,
152 R., p. 403; I expect that to be paid; I feel they owe me that:

I put in my bill; I asked them to **pay me, too, and not to** wait until this bill was paid by the Mo. Pac. or until it was settled, R., p. 405.

JOHN STEPHENS: Am superintendent of Larabee Mills; have been with mill ten years; while it operated at Stafford; I know the operation of its business and am familiar with its business and its machinery, R., p. 406; when transfer was shut off we were running full capacity; 700 barrels per day of flour, using 3200 bushels of wheat; they had a corn plant which we were running making about 100,000 pounds of chop feed, that is, our full capacity; then we had sacking apparatus, sacked corn, and could load it in stock cars; had every facility for handling corn; I remember the days we were shut off at the mill; this was caused on account of no switching being done by the Mo. Pac.; we had made arrangements for teams to haul flour, etc., and a good many times as it came up, we had rainy days and made muddy roads and the roads were in such condition we could not haul any flour, R., p. 407; we would tell the teams to come back in the morning and the next morning conditions would be so bad we could do nothing; the rains made the roads so we just could not do nothing and the teams were there and we had to pay
153 them for their services or they would not come back; we had all facilities for shipping corn; we could get stock cars; we had sacking supplies and could sack corn and load these cars; had this corn plant previous years; I put in another extra sacking board to look out for this large crop that was coming; men were employed after that shut off; in our mill we had no repair days, we kept our

repairs up (R., p. 408) as we went, we did that Sundays; but we had to have men there to stack up flour and when the next morning came, if we could not haul any stuff, of course, we had to stop; we had to keep them busy; around the mill at something, as we could not lay them off; we had second millers, oilers and sweepers, and sometimes I took them to the ware house and stacked up the flour; some laborers were let off; laid off all we could; we were in fine condition to do a corn business when it started in November 1906, to extent of our capacity; we could make 100,000 pounds of corn chop and handle some corn besides; we did not have a switch; that was the reason we had to use teams, R., p. 409; it is a mile and a quarter to the Santa Fe and to the switch track it is a quarter of a mile; I remember the time that the mill shut down, we had rains and bad roads and that was the cause of the shut down; I know the mills and their up to date features; our capacity was 700 barrels but
 154 most of the mills running the way we did made at least 1000 barrels a day; we had 32 stands of rolls; there were nines by thirties, nines by twenty-fours and two nines by eighteens; we had fifteen purifiers; we had scrapers in connection with the machines to keep the machines going, R., p. 410; the mill was one of the latest machines built; ready for trade; as a miller of experience, would say the mills were so situated as to be operated economically in the manufacture of flour and all these kind of things and had all the appliances.

Cross-examination, R., p. 411:

The success of the milling business depends on the wheat crop; within a radius of eight miles; the corn crop of 1906 was a very good crop; a little more than the year before; and year afterwards not quite so good, R., p. 412; we had grain for the last year; there has never been any time when we had to shut down the mill for getting wheat; cannot remember not operating mill on account of scarcity of wheat, R., p. 414; I had charge during the 13½ days we did not operate; we stacked up wheat and a lot of work, R., p. 415; we employed five to fifteen teams; a large number of teams and teamsters; teams carry a load of 2000 to 5000 pounds; cars hold 200 to 250 barrels, R., p. 416; paid teams \$3 per day, R., p. 417.

F. D. LARABEE: In our first claim it is a list of the men
 155 employed and paid for hauling; it was necessary on account of no switching, R., p. 418; it was obligatory, either that or shut down the mill; the claim is \$2415.65 that represents the correct list, the money was paid out by me for that service; the entire claim Exhibit "A" is the claim; the second claim is for \$1011.00 for a force of four men employed for 168½ days, two at the mill and two at the cars to assist in loading and unloading at \$1.50 for each laborer per day, making a total of \$1011.00, R., p. 416; this would not have been necessary had the switching service been there; the total of that expense was \$1011.00; as to the third claim, it is for the services of Fred Newman, necessarily occupied in overseeing and attending to such transfers, 168½ days at \$2.50

per day and making a total of \$420.25; he checked all the stuff out, superintended the loading and check cars, he saw the stuff in the right cars and the right amount and so on; this service was made necessary by the discontinuance of the switching service; this amount was actually paid by me; I had to employ another man in his place; there is an item for consulting Vandever & Martin; I saw Martin; I went and talked to the Attorney General and the railroad board, R., p. 420; I paid them \$25, that was the first legal advice I had; I paid Waters & Waters \$75 to come to Stafford
156 and consult with us about this case; the seventeenth claim is for the expenses of F. D. Larabee, eleven trips to Topeka from Stafford, for the expense of F. S. Larabee for six trips to Topeka from Stafford, and for their time, two days each, at \$10 per day and \$15 expenses each trip, making a sum of \$630, all concerning this case, R., p. 421; I made eleven trips, thought it absolutely necessary to go; paid fare, it took not less than two days; I value my time at \$10 per day; the total expense of the trip is \$35 as near as I can figure it; I asked my father to go, as my brother and I could not; I expect to pay him; my brother was with me several times; this was a reasonable charge for actual expenses of the trips, R., p. 422; the item for expenses of F. D. Larabee in making three trips to Hutchinson from Stafford, three days at \$10 per day and expenses \$9 were made on this suit and necessary; the next claim is my time is worth \$10 a day in attending here; I went twice to St. Louis, on request of Mr. Fall, traffic manager, concerning this suit, R., p. 423, the expenses of J. G. Waters to St. Louis and return amounting to \$12 and for two trips of F. D. Larabee to St. Louis and return, expenses and \$10 a day and making a total of \$160 is correct; it took four men in the wagon business; I was much concerned over the expenses, R., p. 424; the difference in payments
157 is possibly the Mo. Pac. furnished more cars and we did less teaming; Newman was the warehouse foreman; the teamsters were not experienced men, and we had to have an experienced man at the cars, and so we sent him out, R., p. 426; and had to hire a man in his place at the mill, he could not be at the mill and cars; he put in practically all of his time at the switch; the sixth claim is \$25 paid Vandever & Martin; Mr. Webb advised us as to what course of procedure which was followed; I asked Waters to come down and talk it over, and he said he would come for \$75 and pay his (R., p. 427) own expenses and I told him to come, R., p. 428; it was eleven trips I made; railroad fare to St. Louis \$13 or \$52 for railroad fare; a Pullman \$3.50 each trip; gone two days in St. Louis and two or three days going and coming, R., p. 432; \$22.50 for hotel and meals and if staid over night \$2.50 more; these trips were made early in the suit, R., p. 433; the twenty-first claim is for three days attendance of F. D. Larabee in giving in testimony in this case (R., p. 434) taken at Stafford; the twenty-second claim is for my attendance at the present hearing, R., p. 435.

F. S. LARABEE: I made six trips from Topeka to Stafford on this suit; my time is worth ten dollars a day; my expenses are exactly as given here; I went to Stafford one trip, R., p. 437; went to

Topeka to engage Smith; then in September; then on hearing to set aside judgment, then another to consult Waters; my lawyers asked me to be there; to watch the progress of the case, R., p. 438; we felt we ought to watch the case and urge our attorneys to hurry up the case; am cashier Farmer's Nat'l Bank, R., p. 439; I personally paid these expenses, R., p. 440.

F. D. LARABEE: I have statement of cars, all I could get; of cars shipped over the Santa Fe from September 1st to April 9th; it was made by my shipping clerk, Bateman, R., p. 442; taken from my books; the record of yearly output was burned; it would be a hard thing for me to estimate the daily output of the mill any more than we ran practically full time, full capacity, twenty-four hours' run we figure on, R., p. 443; we have no record of the number of days shut down, R., p. 444; you wanted the volume of business done, there are two statements covering that; under head of volume of business done during period, the red numbers indicate the months the switching service was denied us; the total money deposited and total checked out would not indicate the profits; the money was put back in the business; the volume of business done in 1903 was approximately \$562,000; in 1904, \$1,372,000, R., p. 445; in 1905 \$1,297,000; in 1906 \$1,065,000 and for first six months of 1907

\$491,000, that I think is the gross merchandise account; the only year I am prepared to testify as to net profits was the year from July 1906 to July 1907, was \$42,000; the mill burned July 4th and the period I mentioned commenced July 1st; I remembered what our business was, I know that to be a fact; (statements are attached to the testimony), R., p. 446; I have here in the statement 20,000,000 pounds approximately, 100,000 barrels; if there is any in that which was not hauled it may have been possibly some cars of corn; the percentage would be small, R., p. 447.

P. S. LARABEE: Waters & Waters was our attorneys when suit was brought; my brother and I employed them; had no contract with them; we was to pay them a reasonable fee whatever was right and correct; that was the contract, R., p. 474; they have not rendered a bill; we have paid them some, R., p. 475; I expect that we will have to pay what is a reasonable fee; I feel under the law we will have to pay them what they could establish as a reasonable fee, R., p. 477; no contract or agreement that we are to get a per cent; I employed Rossington & Smith myself; have paid all expense bills, R., p. 478; and have receipts; Switzer was employed about the time Rossington & Smith were; Waters employed him; authorized by me to employ him, R., p. 479; I say broadly, our mill required seven

cars a day to operate it, and we were getting about three cars a week from the Mo. Pac.; if it had not been for the Santa Fe our mill would have been bankrupt for lack of service on the Mo. Pac.; I will say further we loaded every car that the Mo. Pac. would furnish us, R., p. 483; it would not furnish us cars; we were glad to get cars at any time, R., p. 484; our demands were constantly, R., p. 489; the Mo. Pac. brought to our mill all loaded cars consigned over the Santa Fe, R., p. 491; cars were loaded to their capacity, R., p. 498; every car went back loaded and when

it went back loaded, we did not charge for hauling; if we hauled, there were no empty cars standing on our track which we could have loaded, and we hauled every day, and if we could have loaded all or nearly all today; we would have to put on a double force tomorrow to haul over; our bill was presented for hauling and not for unloading, R., p. 503; I don't think we loaded any cars during the 13½ days of shut down, E., p. 506; I mean to say absolutely our mill was shut down on account of the mud, R., p. 507; during these days; by that year, the lack of service prevented us from grinding all through the season during these muddy days; and we figure a profit we could have made, had we been permitted to run on those days; we based it on what we had done that year, R., p. 508; we simply shut down because of the mud; the mill would have
 161 been running if we could have gotten the stuff out of the way; the ground was so muddy we could not haul it; the number of teams we used, the roads were badly cut up; the city would hire teams to grade the road up; we cut up two streets leading up there, R., p. 509; we cut it up as soon as they dragged it; we might have hauled a quarter of a load, R., p. 510; when I speak of doing no corn business on account of lack of service, I mean lack of service on the Mo. Pac. R., p. 512.

Cross-examination:

It is a mile from our mill to Santa Fe track; had an estimate made that it would cost \$6500 to build track from our mill to the Santa Fe, R., p. 514.

F. D. LARABEE, further cross-examination: Statement was prepared by our bookkeeper; I checked it with him and do not remember what figures might have been submitted before that, but that statement that was finally filed in the court was a correct transcript of our expenses from the book, R., p. 521; the statement filed was absolutely correct, R., p. 522; I refer to the last statement, R., p. 523; the full claim for the amount of damages; a force of 4 men employed 83½ days up to December 8th, 1906, two at the mill and two at the cars to assist in loading and unloading at \$1.50 each and making a total of \$501 is not included in Exhibit "A";
 162 we did not know what men were at the mill or at the car engaged in the work; they were not carried on the pay roll as a special work; we actually paid that; they performed no other labor when they were doing this, R., p. 526; the bookkeeper knew there were two men at the cars and two at the warehouse; I got it from pay roll; the superintendent prepared the pay roll; he kept the hours himself; a complete shut down for the 5½ days made necessary in consequence of muddy roads, making it impossible to operate the mill and transfer cars at a loss of the known profits of the mill of \$250 per day and making an aggregate of \$875 is right and correct, R., p. 527; the estimated loss is based upon previous profits; the seventh claim from November 1st to December 8th, being 8 days when corn commenced to move, 33 days in which the mill did no shipping or grinding corn, or chop feed, as it could not get the cars for such pur-

pose; I furnished that item of \$2475; we could not load the corn, if we had got it, and we could have loaded the corn if we had got the car service, R., p. 528; we handled six or seven cars a day, R., p. 529; I think we would base the profits upon the profits of the preceding year, relative capacity might have something to do with the progress; in fall or winter of 1905 we increased the capacity

200 barrels, R., p. 533; the congestion came at the loading
163 dock; where we were loading teams to haul flour across to the Santa Fe; our docks were not of sufficient capacity to handle corn chop if we handled flour; if the switching had been there, if we could have obtained cars, we certainly could; the Santa Fe treated us nicely, nicer than the Mo. Pac. ever did, they had good tracks, good service; we must have gotten all the cars we asked for, from the Santa Fe, because we kept our mill going whenever it was possible to run, R., p. 534; we were loading it over the Santa Fe, we had to; we could not grind continuously and not load it out; we got sufficient cars to keep us running, R., p. 535; we were advised by our attorneys after the decision that we should file a claim for damages, and we furnished him the data, R., p. 537; there was nothing paid for hauling absorbed by the Santa Fe; nor any understanding to that effect, R., p. 538.

F. D. LARABEE: Further cross-examination: I was a party to the employment of Waters & Waters; he came down and advised us for \$75 and on his advice that we had a case, we employed him, to bring the case; there was no amount fixed for a fee; at that time, R., p. 600; he told me later in case of winning the suit, that defendant was to pay attorneys' fees; we agreed to pay his claim; if the case
stopped there I think \$2500 was the maximum fee; further
164 we made no bargain with him; I do not see how we can avoid a reasonable fee, R., p. 601; I think I would be responsible for the payment of his fees; think we have paid them \$2000 or \$2500; he has presented no written bill; I think we have paid Rossington & Smith one thousand; am not positive of the amount paid them; have paid Switzer nothing; advanced Waters between \$600 and \$700 to go to Washington, R., p. 603.

J. G. WATERS: Am an attorney; 40 years in Kansas; Waters & Waters were the original attorneys in this suit; afterwards Switzer and Rossington & Smith came in, R., p. 617; went down to Stafford; I was to have \$75 and my railroad fare for my services then; we talked the matter over, I suggested a suit in the Supreme Court to compel them to restore the service on their tracks, and I made the agreement with F. D. Larabee that I was to start the suit in Supreme Court, with the understanding that I should be paid a reasonable fee for my services; I came home, opened communication with Waggener, wrote him and he assured me he would do his best at settlement without suit and requested a delay in bringing it; I delayed it and we had several telephones, my telephone bill was \$2.50; I gave him the delay; after a wait of about two weeks I prepared the af-

fidavit for the alternative (R., p. 618) writ; applied to the
165 Supreme Court for the writ; it was allowed and served and
they were required to answer September 21st; the suit was
filed September 15th; they were required to make return to the writ
September 21st; they came in and asked for further time; the court
gave them five days; they filed a plea in abatement; they set up inter-
state commerce, it was taking their property without due process,
contrary to the constitution of the United States; that the court had
no jurisdiction; we demurred to the plea; the hearing was set for
October 1; we appeared as the sole (R., p. 619) counsel for Larabee,
and Judge- Doster and Waggener appeared for defendant; we filed a
brief of about 21 pages to that plea and I made oral argument and
so did they; think they had printed brief; the case was heard Oc-
tober 1; at that time I had only in a fair way and in a casual man-
ner been acquainted with the law pertaining to interstate commerce,
or the commerce clause of the constitution, the Hepburn Act or any
of its preceding acts, but on my employment went through the eleven
volumes of the Interstate Commerce Commission Reports, the entire
body of the United States decisions, to ascertain what I could in the
way of legal information relating to the status of the case; it was
argued by both sides in the Supreme Court of Kansas, R., p. 620;
the court sustained the demurrer, and gave defendant to Oc-
166 tober 10th to answer; I think the plea was amended; there
was an answer; the contention in the answer was the same
as in the plea and other matters beside; that it was Interstate Com-
merce business, R., p. 621; that the traffic was interstate, wholly
cognizable in the Federal Court, that it was taking property without
compensation and in violation of the 14th amendment of the consti-
tution of the United States and they varied these matters; in the an-
swer and plea, no reference was made to the 4th proposition, urged in
the Supreme Court of the United States; we appeared in the Supreme
Court to have the case set for trial; the court set it for November 9th
and ordered the taking of testimony; Judge Sluss was appointed com-
missioner; he sat at Stafford and took testimony and then came to
Topeka and took some; we were three or four days down there and
one at Topeka; the commissioner made report of the testimony and
(R., p. 622) his conclusions of fact and law; these conclusions were
the basis of the trial in Supreme Court of Kansas, and afterwards in
the Supreme Court of the United States; the case came up for hearing
at November session; we filed brief and defendant did the same; the
case was argued by Doster and Waggener and by Waters & Waters;
both sides filed printed briefs on file here, R., p. 623; from
167 the time I was engaged I gave it my serious attention a great
deal of my time, up to this hour; I was working on it for the
entire time this case has been in court; it was commenced September
15th or 16th, 1906; we originally asked for writ to compel them to
issue bills of lading without certain obnoxious provisions, and also to
restore the switch service; before the case was tried in the Kansas
Supreme Court, we filed a withdrawal of all relief asked as to the
bill of lading and that it should not be considered by the court; the
case was argued with that on file; there was but one thing litigated

and that to compel a restoration of the switch traffic, R., p. 624; on December 8th the court rendered judgment awarding a peremptory writ; a written opinion was filed; costs and damages were also awarded; the plaintiff was given ten days to file a claim for damages, stating the items, the opinion is here, R., p. 625; and is found in 74 Kas. 808 to 823, it saved my client the costs of court; say \$600; if my client had lost it would (R., p. 626) have to suffer the loss by stoppage of the switching service, and it would have been a permanent loss from year to year, according to the business done or as long as its business continued or it had made its peace with the Mo. Pac.; until the commissioner decides, I cannot know, but from my information, if it had been defeated the loss would have been

168 \$24,000 for the stoppage, R., p. 627; the defendant applied for a writ of error; it was allowed by Chief Justice Johnston and it gave a \$20,000 supersedeas bond, R., p. 628; the judgment was superceded from December 20th to April 1st; they ordered the record; I was in a hurry to have it filed, and Larabee advanced the \$150 necessary as costs; I paid the appeal myself; Mr. Waggener had delayed it; he had done every thing but file the record and I had requested him several times to do so, R., p. 629; the next step was to prepare for this controversy in the Supreme Court of the United States; the defendant filed a brief; 107 pages; Waggener was sole attorney, R., p. 630; he gave it his personal attention; I had not been admitted in that court; we got scared over the situation; we thought it was a large controversy; Larabee felt that he ought to be prepared; he gave me authority to employ an assistant; Switzer was on the floor here; I had known him for years, his character and reputation as a lawyer was the best; I had business with him in the past and absolute confidence in his judgment, and I engaged him and agreed that they would give him a reasonable fee for his service he performed; he consented, R., p. 631; he was here day after day with me, we looked up authorities together and gave it our best and undivided attention and when it became necessary we filed a

169 brief of 40 pages; Larabee was told of Switzer's employment and it met with his approval, R., p. 632; the firm of Rossington & Smith I have known all the time it was a firm; been intimately acquainted for 25 years; it has had the cream of the business; the higher and weightier concerns, and the better paid litigation, during all the time they have been in business; they were considered particularly well informed of the procedure, equity or otherwise, of the Federal court, R., p. 633; I was scared over the importance of this case; I wanted help; I think it was needed; it was in my judgment a grave controversy; Waggener told us Judge Dillon agreed with him and would argue the case in the United States Supreme Court; they were employed; Mr. Rossington prepared and filed a brief, R., p. 634; in answer to the brief of the defendant; 39 pages; they stood at the head of the profession, reputable, clean gentlemen with confidence of court and client; down to this day, without stain; the clerk of the Supreme Court of Kansas directed the writ to issue following the alternative writ and included the bill of lading matter which had been released, and the record so showed, R., p. 625; a

motion was made in the Supreme Court of Kansas to correct same which was done, and after our motion the record was so amended in the Supreme Court of the United States; 22 pages; by agreement, R., p. 636; Waggener filed brief; Exhibit "G", October 10th, a few days before case was argued; 129 pages; he served it on us in Washington; we had expected one about October 1st; I think I filed another brief; case was finally heard and argued October 15th; we went twice; we went April 1st to try the case; I went and so did Rossington; we were there twelve to fourteen days in April waiting for our case to come up; it was not reached and we agreed to continue to October; I came home; we went in October; I was there twelve days; Rossington had died, and Mr. Smith went with me; we were consulting all the time, R., p. 638; we went to present the case; we went late in September and October 15th, it was submitted upon brief and oral argument; Waggener making an oral argument and which was replied to by Mr. Smith and myself; opinion handed down January 12th, 1909; it was favorable to Larabees in every essential proposition; three dissenting opinions, R., p. 639; many authorities were gathered and commented on by Justice Brewer, R., p. 640; the opinion tended to corroborate my ideas of the difficulty of the case I had in preparing it; Mr. Waggener has up to this hour, my absolute confidence that he is a great lawyer; respected by courts, his opinion considered authority; he stated in his briefs that he was certain of his grounds and that the Supreme Court had decided in his favor; I found out in reading his decisions this was the biggest court in the world, and this would affect every one of the forty-six American states, R., p. 641; I quote from his briefs as to the extent and character of the controversy; (the briefs and character of the controversy are before the commissioner without repeating it from the testimony); the defendant made application for a rehearing and filed a written brief; this is the petition for rehearing and I think (R., p. 642) it contains 60 pages; the court overruled it; the judgment of the State court was affirmed and the writ of error dismissed; by a unanimous court; after the mandate was sent down, the defendant appeared again in the State Supreme Court and moved that court to set aside its own judgment on the ground that it was void; we contested it; we argued it, R., p. 643; we asked leave to file amended list of damages, which was granted; we filed the amended list; the defendant moved to make us itemize them which was overruled, R., p. 644; Exhibits "A", "B", "C", "D", "E", "F", "G", "H" and "Y" offered in evidence and bound in the record of the testimony; from my knowledge of what Switzer did personally, the character of the controversy and the court it was in, it was worth fully \$5,000, R., p. 651; the value of the services of Rossington & Smith, is the full amount claimed by them \$30,000; as to my own services, somebody else has got to do that, R., p. 654; have known Mr. Waggener for almost a life time, we have been in several controversies together; and have been intimate; his general reputation is the very best; as a man of influence with the courts and a national reputation; Switzer's claim is \$5000; Rossington & Smith \$30,000; Waters &

Waters \$40,000; I prepared two hypothetical questions marked Exhibit "X" gathered from an investigation of the records themselves, and they were intended to be true, and I think they are true, R., p. 655; in the first, I run over the brief and call attention to the pages of the brief in which he sets out this one proposition; everything he argued in the State court, he argued in the U. S. Supreme Court; his Supreme Court contention was, that where a railroad is at all engaged in interstate commerce, that fact loses the state all jurisdiction even as to state commerce; the statement of facts fairly presents the facts, R., p. 656; the facts are supported by the evidence and pleadings and procedure in the case; except from page 10 at bottom of page and from that on two or three pages gives my opinion of the facts and contentions, the extent and magnitude of that contention and what it would have resulted in had the Larabees been de-

173 feated, R., p. 657; the facts are based on Mr. Waggener's own presentation of that contention in the Supreme Court; it had not appeared in the Supreme Court of Kansas but he extended the argument in that controversy until it became almost limitless; based on his own argument of the extent and magnitude of the controversy, and his statement that it had already been decided in his favor; two or three times so stated; the question is based on his brief upon the facts in this case; the Exhibit "X" was marked and attached and made part of the record, and is not set out for the reason that the commissioner is perfectly familiar with its contents, R., p. 658; they are the facts, the real facts as they appear of record, R., p. 660. Cross-examination: Prepared application, could do this in half an hour, R., p. 661; the initial matter was a \$78 demurrer charge; I understood if we had paid that the service would have been restored; we refused to pay; I so advised; we have all along understood if we paid it the service would be restored, R., p. 662; I had other business; took twenty minutes to argue demurrer to your plea, R., p. 664; I told Larabee early in the game that I would charge them as much as \$2500 for my reasonable services; nobody knew it would go to the Supreme Court of the United States, R., p. 670; they have paid me \$500, \$700, \$600, \$300 and may be more; \$500 was to cover expenses in United States Supreme Court, R., p. 672; never presented a bill; Switzer was employed early in the
174 affair, R., p. 673.

A. M. JACKSON testified as to the fee based on hypothetical questions, (R., p. 685); I think it would be from forty to fifty thousand dollars, R., p. 692.

ROBERT J. BROCK testified as to the fee based on hypothetical questions, R., p. 699; I should say twenty-five thousand dollars for all services, R., p. 702.

J. G. WATERS: I went two trips to Washington and there would be, as near as I can estimate, five hundred dollars for the two trips; \$250 a trip about, R., p. 710; I employed Mr. Houston, R., p. 711; I agreed to pay him, R., p. 712; (the entire record is before the commissioner), R., p. 713; I spent \$500 on those trips exclusive of anything I bought for myself. Rossington stopped at same hotel, and his expenses were about my own; my expenses were \$250

a trip; that would be \$500, R., p. 714; Rossington & Smith's expenses would be about the same, \$900 to \$1000 for the two trips of the two men, R., p. 715.

E. A. AUSTIN testified to the fee based on hypothetical questions: I would say thirty-five to fifty thousand dollars, R., p. 720; (The matter out of Exhibit "X"; all that sentence on page 10, and all matter on pages 11 and the last five lines on page 13 were not eliminated from the question as propounded to Judge
175 Jackson, but it has to all other witnesses, R., p. 745.).

A. M. HARVEY: I should say \$35,000 would be a reasonable fee for the entire work; Waters & Waters \$20,000, Rossington & Smith \$10,000 and Switzer \$5,000, R., p. 750.

E. S. QUINTON: A fee of \$50,000 would be a reasonable fee, R., p. 767.

LEE MONROE: The fee for all the attorneys \$30,000.

GEORGE H. WHITCOMB: I should say somewhere from \$25,000 to \$35,000, R., p. 814.

M. M. MILLER: In my judgment from \$30,000 to \$40,000, R., p. 821.

W. E. STANLEY: A reasonable attorney's fee would be from \$30,000 to \$40,000, R., p. 862.

T. W. SARGENT: \$40,000, R., p. 877.

KOS HARRIS: \$35,000 to \$40,000.

J. F. GETTY: \$35,000, R., p. 897.

W. F. GUTHRIE: \$50,000, R., p. 907.

JOHN H. ATWOOD: \$40,000 as a minimum, R., p. 918.

WM. G. HOLT: \$50,000, R., p. 931.

E. C. LITTLE: \$50,000, R., p. 937.

L. C. BOYLE: \$35,000 to \$40,000 in the Supreme Court of the United States and \$5,000 in Kansas Supreme Court, R., p. 945.

(The testimony of attorneys is too voluminous to be included in this abstract.)

176 CHARLES BLOOD SMITH: The fee in the Kansas Supreme Court, under the question put by Mr. Waggener would be \$3,000, R., p. 1218; under the hypothetical question put by Mr. Waggener, if that was the only question involved in the case, and one of the counsel argued it, I should think the fee in the Supreme Court of the United States should be from \$5,000 to \$10,000, R., p. 1221; paid express charges 34 cents; \$43.50 for printing briefs; express charges 25 cents; printing motion \$25.00, R., p. 1222; expenses to Washington \$160 November 9th, R., p. 1223; telegrams \$2.44, expenses of Smith taking testimony at Hutchinson, \$12.00; hotel bill at Washington \$7.30, R., p. 1224; as a lawyer of long standing and experience at the bar, over the state and Supreme Court and Federal Court, I know what service I performed in the preparation of brief and the argument made, and I know the service performed by Mr. Rossington taking into consideration my expenses as to the customary fee as the amount involved, and ultimate results, I should say \$25,000. (This was in response to the question asked him, his answer being simply the amount) for our firm, R., p. 1229; I think Senator Waggener's statement in

his brief contains the question involved in concise manner as to the magnitude of questions litigated and the result if the
 177 railroad had prevailed would have been, the entire control of shipments would have been under the Interstate Commerce Commission, regardless whether intra-state or inter-state shipment; we have had more or less business in the Supreme Court of the United States for 25 or 30 years, R., p. 1238.

MATT G. CAMPBELL for defendant: \$750., R., p. 1250; my best judgment \$1500, R., p. 1255.

M. A. LOW: \$1000 state court, \$1000 in United States Court; out of this fee in the United States Supreme Court, should be deducted the expenses of both trips, and if going to two attorneys, the balance should be divided between them, R., pp. 1275, 1276.

O. J. WOOD: \$1000 in Supreme Court of Kansas, R., p. 1283; from \$1000 to \$1500 in United States Supreme Court, R., p. 1289.

J. D. McFARLAND: \$1000 to \$1500, R., p. 1301, in state court and same in United States Court, R., p. 1306.

J. S. WEST: \$1000 in Supreme Court of Kansas, R., p. 1318; \$1500 and expenses in Supreme Court of United States, R., p. 1322; \$30,000 or \$40,000 would not be too much if it involved the actual life and vitality of a business to make that a reasonable basis at all, R., p. 1343.

T. F. GARVER: \$1000 and expenses in the state Supreme
 178 Court, R., p. 1352, and \$1500 and expenses in United States Supreme Court, R., p. 1356.

W. R. SMITH: \$1000 to \$1200 in State Supreme Court, R., p. 1380, and \$2500 in United States Supreme Court, R., p. 1385.

J. G. SLONECKER: \$500 and \$25 a day in Supreme Court of Kansas, R., p. 1404, and \$2000 or \$3000 and expenses in United States Supreme Court and actual expenses, R., p. 1408.

H. L. ALDEN: \$750 in State Supreme Court and \$2000 in United States Supreme Court, R., p. 1410.

R. MILLER: \$1000 in State Supreme Court and \$2000 to \$2500 in United States Supreme Court, R., p. 1422.

A. L. BARGER: \$1000 in State Supreme Court and \$2000 in United States Supreme Court, R., p. 1425.

F. D. LARABEE: The claim for hauling flour and mill feed from mill to cars of (R., p. 1432) \$1056.39 was furnished by book-keeper and I am confident they are correct records, R., p. 1433; the item 83½ days of a force of four men \$501 does not include laborers mentioned in Schedule "A" that is in addition; and a like item for such labor at an expense of \$6.00 per day subsequent to December 8, I intended to cover the expense for the time the traffic was interrupted from December 8 until it was resumed, R., p. 1434; the claim for a complete shut down of 3½ days to December 8 because of muddy roads \$875 did not in-
 179 clude anything subsequent to December 8, R., p. 1435; paragraph 7 was up to December 8th. R., p. 1436; we arrived at \$75 a day profit each day in the corn business by estimating the volume of business we could do, and the profit which we knew was in the business at that season; it was based partly on experience,

because we do some corn business which didn't go through the mill, R., p. 1438; the statement is not exactly an estimate or guess because we had some experience in corn business during that season and knew what the profits were; we handled corn independent of the mill from the elevator in Stafford; the mill was then being operated at its full capacity for flour business, R., p. 1439; we could not handle the corn stuff to and from the mill without the switching service which was denied us; because we couldn't get it to the loading docks to load it in the wagons; we could grind chop and feed and run the mill to its full capacity, R., p. 1440; and the expense incident to operating it to its full capacity was the expense incurred in hauling; we filed a statement of the expense of hauling from December 8th, January, February and March showing exactly what those expenses were, R., p. 1441; it was taken the same as the first statement, from the books; the items of damage filed in the original statement 180 includes the items to December 8th, the day that was filed, but did not include the subsequent items, I think this is correct, R., p. 1442; the statement of the claim for damages filed on December 8th that it was intended should include all the damages we had sustained up to that date, R., p. 1447; I can tell the profit from my mill for the corn business for 117 days was \$75 to \$100 a day as it was known to me by investigation and by being in touch with other mills, that the corn business for the mills located in that section was the best of any year they had ever known; each year government itself now that year was a particularly good year; we did some corn business at our elevator; in fixing our profits of \$75 per day in the original statement, and \$100 in the amended statement, it was not entirely speculative, because we were in touch with conditions and we did a corn business; we had to estimate it some from what we could gather, R., p. 1450; we might have had years that would be just as good, but I don't remember one that was quite as good, as that particular year; it was a business proposition to buy and sell the product, R., p. 1451; I don't think I ever employed Mr. Houston, R., p. 1453; we never spent a dollar for hauling flour or stuff from or to the Santa Fe track we could get carried by the Mo. Pac; we did not incur unnecessary expenses, R., p. 1454; we loaded 181 all the Mo. Pac. cars they furnished us. We deemed it an absolute necessity if we wanted goods carried we had to send them across by wagon; we had a corn arrangement with our mill in which we ground corn and flour at the same time; our capacity was 100,000 pounds daily; we had run it to its full capacity; the corn was in the country and obtainable by us; a very good corn crop; sufficient with the other mills to supply our mill to its capacity; corn was being shipped out frequently, R., p. 1455; we were at Hutchinson 3 days; F. S. Larabee came from Stafford; my brother and myself were at Topeka three days when Mr. Wellman was there; we came from Hutchinson to Stafford; was at Wichita 2 days; at Kansas City one day; I put my service at ten dollars a day, and railroad fare, going and coming and hotel bills, R., p. 1458; fare from Stafford to Hutchinson 78 cents; from Hutchinson to Topeka, \$312.12; 94 cents to Wichita; to Kansas City \$4.40 each way, and Pullman fare each time, R., p. 1459.

In all the questions asked by the defendant as to attorneys' fees the amounts were fixed from the statements embraced in the defendant's own hypothetical questions, which are not stated, as the commissioner is familiar with them.

The plaintiff claims that it is entitled to recover the following items of damages suffered by the Mill Company in its business, and occasioned by shutting off the switching service, to-wit:

For hauling flour, grain and mill stuffs from the mill of plaintiff to the cars on the Santa Fe track.....	\$2,415.00
For a force of 4 men employed 168½ days, two at the cars, to assist in loading and unloading at \$1.50 for each laborer, each day	1,011.00
For the time of Fred Newman necessarily occupied in also overseeing, and attending to such transfers, 168½ days at \$2.50 per day.....	420.25
For briefs	193.50
For expenses of W. H. Rossington, 12 days in April 1908 attending the Supreme Court of the United States, paid by plaintiff	250.00
For expenses of J. G. Waters, 14 days in April, 1908, attending the Supreme Court of the United States at Washington	250.00
For expenses of Charles Blood Smith, 14 days in October, 1908, attending the Supreme Court of the United States, paid by the plaintiff.....	240.30
For expenses of J. G. Waters, 14 days in October, 1908, attending the Supreme Court of the United States, paid by the plaintiff.....	240.30
183 For attorney fees Waters & Waters, Supreme Court of Kansas .....	.....
For attorneys' fees of John F. Switzer, Waters & Waters, Rossington & Smith, subsequent to judgment in Supreme Court of Kansas .....	.....
For attendance of F. D. Larabee and F. S. Larabee three days each at Topeka, (R., p. 1458) at \$35 the trip for each, \$10 per day, hotel and railroad fare...	140.00
For attendance of F. D. Larabee at Wichita, two days, at Kansas City one day, and at Hutchinson one day for also F. S. Larabee.....	64.36
For a complete shut down of the mill, one-half day in November 1906, and also for December 1st, 3d, 4th, 24th and 26th, 1906, January 1st, 2d, 12th, 28th, 29th and 30th, and February 27th and 28th, 1907, made necessary in consequence of muddy and bad roads and rains, making it impossible to operate mill and transfer products by team and labor, which would have been wholly obviated if the switch transfer service had been given at a loss of the known profits of the mill, 13½ days at \$250 per day.....	3,375.00

184	For 117 days, from Nov. 1st, 1906, when corn commenced to move and be received at the mill, in which the mill practically did no shipping or grinding of corn, as it could not get the cars for such purpose; that the corn business came off the Santa Fe and not from the Mo. Pac.; that the mill had an established corn business over the Santa Fe until the transfer was stopped; that it couldn't be transacted by hauling as the flour transfer monopolized all the facilities and means of transfer of the mill; that the established business of the mills of the plaintiff has suffered loss and damage for 117 days, reasonable profit each mill day, by cutting off this corn business.	11,700.00
	For amount paid to Vandever & Martin.....	25.00
	For services of C. G. Webb.....	500.00
	For amount paid to J. G. Waters.....	75.00
	For cash paid out for the expenses of F. D. Larabee for 11 trips from Stafford to Topeka, for the expenses of F. S. Larabee for 6 trips to Topeka from Stafford and for their time being for 2 days each trip,	
185	for each and \$15.00 expenses for each trip, all concerning this case	630.00
	For expenses J. G. Waters to St. Louis.....	12.00
	For 2 trips of F. D. Larabee to St. Louis and return, expenses and \$10 per day.....	160.00
	For expenses of F. D. Larabee and F. S. Larabee in making 3 necessary trips to Hutchinson from Stafford, at \$10 per day and expenses \$9.00.....	39.00
	For cash advanced the stenographers.....	
	For cash advanced the Commissioner.....	
	For three days necessary attendance by F. D. Larabee before Commissioner at Stafford in the previous taking of testimony	30.00
	For cash advanced Mr. Wellman on Stenographers' fees.	
	For cash advanced on the fees and expenses of the Commissioner	

This abstract is substantially correct.

WATERS & WATERS,
ROSSINGTON & SMITH,
JOHN F. SWITZER,
Attorneys for Plaintiff.

J. D. HOUSTON,
Of Counsel.

186

Abstract.

F. D. Larabee, pages 1-2; 6 to 10 inclusive. Cross Examination, 10-11. Re-Direct, 12. Re-cross, 12; 22 to 25 inclusive; 26-27. Further Cross Examination, 29 to 32 inclusive; 46 to 49 inclusive.

F. S. Larabee, pages 3; 16-17. Cross Examination, 17-18; 27 to 29 inclusive. Cross examination, 29.

Mr. Garrigues, page 2.

L. S. Ferry, page 3.

J. G. Waters, pages 4; 32 to 41 inclusive; 42.

E. D. McKeever, page 5.

J. F. Switzer, page 5.

J. J. Schenck, page 5.

A. B. Quinton, page 6.

G. H. McNair, page 14.

G. S. Bennett, page 14.

J. A. Whitehurst, pages 14 to 16 inclusive.

William Kelley, pages 18-19.

G. C. Webb, pages 19-20.

John Stephens, pages 20 to 22 inclusive. Cross Examination, 22.

A. M. Jackson, page 42.

Robert J. Brock, page 42.

E. A. Austin, page 42.

187 A. M. Harvey, page 43.

E. S. Quinton, page 43.

Lee Monroe, page 43.

George H. Whitcomb, page 43.

M. M. Miller, page 43.

W. E. Stanley, page 43.

T. W. Sargent, page 43.

Kos Harris, page 43.

J. F. Getty, page 43.

W. F. Guthrie, page 43.

John H. Atwood, page 43.

Wm. G. Holt, page 43.

E. C. Little, page 43.

L. C. Boyle, page 43.

Charles Blood Smith, pages 44-45.

Matt Campbell, page 45.

M. A. Low, page 45.

O. J. Wood, page 45.

J. D. McFarland, page 45.

J. S. West, page 45.

T. F. Garver, page 45.

W. R. Smith, page 46.

J. G. Slonecker, page 46.

H. L. Alden, page 46.

R. Miller, page 46.

A. L. Barger, page 46.

Items of Damage, pages 49 to 53 inclusive.

188 Be it further remembered, that afterwards on the 7th. day of April 1911, and on the 20th. day of April 1911, there were filed in the office of the clerk of the supreme court of the state of Kansas, respectively, the abstract of the defendant, and

the Brief and supplemental abstract of the defendant, which abstract and brief, etc. are in the words and figures, as follows, to-wit:

189 Filed Apr. 7, 1911. D. A. Valentine, Clerk Supreme Court.

No. 15167.

In the Supreme Court of the State of Kansas.

No. 15167.

THE LARABEE FLOUR MILLS COMPANY, Plaintiff,

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Before the Hon. H. C. Sluss, Commissioner.

*Counter-Abstract of the Defendant of Proceedings and all Evidence
Taken Before the Commissioner.*

B. P. Waggener, Attorney for Defendant.

190 In the Supreme Court of the State of Kansas.

No. 15167.

THE LARABEE FLOUR MILLS COMPANY, Plaintiff,

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Before the Hon. H. C. Sluss, Commissioner.

*Counter-Abstract of the Defendant of Proceedings and all Evidence
Taken Before the Commissioner.*

The defendant here challenges the correctness of the abstract of testimony presented to the Commissioner, and presents the following as a correct abstract of the proceedings and of all the testimony to be considered by the Commissioner.

191 The following stipulation (omitting title) was entered into by counsel for the respective parties to this controversy:

Stipulation.

"It is stipulated and agreed by and between the respective parties hereto that each party has reserved the right to present any objection or exception to the Referee or to the court to any question, evidence, matter or proceeding herein, to the same purpose and with like effect as if such objection or exception had been made and exception noted at the proper time; and neither party shall be

held to have waived any right to present to the Referee or to the court any objection or exception by reason of having failed or neglected to have the same noted or made a matter of record at the time when such objection or exception might or should have been made, and record thereof preserved.

ROSSINGTON & SMITH,
JOHN F. SWITZER,
WATERS & WATERS,

Attorneys for Plaintiff.

B. P. WAGGENER,
Attorney for Defendant."

On the 19th day of September, 1906, there was filed in the office of the clerk of the Supreme Court of Kansas the alternative writ of mandamus, showing service of said writ by the sheriff of Shawnee County, Kansas, upon the defendant, which said alternative writ, together with sheriff's return and endorsements thereon (omitting title), is in words and figures as follows, to-wit:

192

Alternative Writ of Mandamus.

The State of Kansas to the Defendant, The Missouri Pacific Railway Company, Greeting:

Whereas, it has been represented to the Supreme Court of the State of Kansas, by an affidavit on the part of the plaintiff in above entitled action, that the plaintiff, a co-partnership composed of F. D. Larabee and F. S. Larabee, has been engaged in owning and operating a mill and elevators, and in the purchase, sale and shipment of grain, flour and feed stuffs in connection therewith for several years last past, at the City of Stafford in the County of Stafford, in the State of Kansas, and that its mill and elevators are situated upon the tracks of the defendant company, a railway corporation, and that there is a transfer track built from a connection with the tracks of the Atchison, Topeka and Santa Fe Railway Company to a connection with the tracks of the defendant at its station at said City of Stafford, and that for three years last past, the defendant has continuously until the 29th day of August, 1906, by its engines, taken and transferred cars, loaded and unloaded, from said transfer track and from the Atchison, Topeka and Santa Fe Railway Company, and delivered them to the plaintiff at its mill and elevators, and upon request of the plaintiff to return such cars, loaded and unloaded over said transfer tracks again into the possession of the said Atchison, Topeka and Santa Fe Railway Company and that the defendant charged for such transfer service, of

193 receiving and returning said cars, the sum or price of two dollars per car, and that on the 29th day of August, 1906, the defendant refused to further make any transfer of cars over said transfer track, without reasonable excuse therefor; that the plaintiff at all times had promptly paid for such service; that it had extended its business over the line of the Atchison, Topeka and

Santa Fe Railway Company, and that said transfer track is the only practicable means of receiving or sending cars or receiving or sending shipments of grain, flour and mill stuffs, from or to customers on the line of the Atchison, Topeka and Santa Fe Railway Company, and that the refusal of the defendant to continue to transfer cars over such transfer track is to the serious damage and loss of the plaintiff, in the transaction of its daily and constant business at its mill and elevators, and it is further so represented that the defendant owes the duty to the plaintiff to transfer cars over said transfer track to and from a connection with its mill and elevators and to and from the Atchison, Topeka and Santa Fe Railway.

And it has been further so represented that the traffic in grain handled by the defendant at its station at the said City of Stafford, has for several years last past exceeded over one hundred cars of grain each calendar year shipped and transported over its track at said station; that it has at said station a track or car scales of sufficient capacity for weighing grain in car load lots and in the car; that the defendant has at all times refused to weigh any and
194 at all times compelled the plaintiff to accept bills of lading on every car of grain shipped over its line, in which is stated that the defendant was not liable for damage or shortage thereto, and refuses to issue to the plaintiff bills of lading on any other condition or terms whatever; and it is further represented that the defendant owes the duty to the plaintiff to receive its shipments of grain in car load lots without exacting from the plaintiff that it will not be responsible for loss or damage in the carrying of the same, and that such exactions are in violation of law, and that as to each of the foregoing matters the plaintiff has no plain, speedy or adequate remedy at law.

Now, therefore, being desirous that justice may be done in the premises, you, The Missouri Pacific Railway Company, the defendant herein, are hereby commanded, that you immediately restore, resume and make transfer of cars, loaded and unloaded, to and from the line of the Atchison, Topeka and Santa Fe Railway Company and to and from its mill and elevators at the station and City of Stafford in the County of Stafford and State of Kansas, upon the request and demand of the plaintiff and upon the payment of the heretofore customary charges therefor, and that you at once and without delay issue upon all shipments of grain by the plaintiff in car load lots from its mill and elevators at said station, without the condition in the bills of lading therefor, that it is not responsible for loss or damage therefor.

Or, if you have any just or valid excuse for not so doing,
195 that you do on or before the 21st day of September, 1906, show cause why the writ of peremptory mandamus should not be allowed; and that you then and there return this writ with your answer thereto, that you have done the things herein commanded, or therein show cause why you have not done so.

Witness the Honorable W. A. Johnston, Chief Justice of the Supreme Court of the State of Kansas, and the seal of said Court, at

tested by the Clerk of said Court at the City of Topeka, this 15 day of September, 1906.

[SEAL.]

D. A. VALENTINE,

Clerk of the Supreme Court of the State of Kansas.

On presentation of the affidavit for the writ of mandamus, and on the application of the plaintiff, this alternative writ of mandamus is allowed, this 15 day of September, 1906.

W. A. JOHNSTON,

*Justice of the Supreme Court of the
State of Kansas.*

On the 10th day of October, 1906, the defendant railway company filed its answer to the alternative writ of mandamus, to which reference is here made as fully as if copied herein.

On the issues as joined between the plaintiff and defendant, and matters and things in controversy were referred by the court to Hon. H. C. Sluss, Commissioner, to hear the evidence and make findings of fact thereon. Such findings of fact were thereafter made, and filed with the clerk of the court on the 15th day of November, 1906, and (omitting title) are in words and figures as follows:

196

Findings of Fact.

Henry C. Sluss, Commissioner, appointed by the order of the court in this cause to take the testimony and report findings of fact, comes and submits that having taken all the testimony desired by either party, and having fully considered the same, *have* made findings of fact upon said testimony as follows:

First.

In the succeeding findings The Missouri Pacific Railway Company will be referred to as "The Missouri Pacific"; the Atchison, Topeka and Santa Fe Railway Company as "The Santa Fe"; The Missouri Valley Car Service and Storage Association as "The Car Service Association"; and the plaintiff as "The Mill Company."

Second.

Stafford is a flourishing town of 1,600 people in Stafford County, Kansas, surrounded by a large scope of country productive of large annual crops of wheat. The Missouri Pacific and the Santa Fe each have a line of railroad running practically east and west through Stafford, with freight and passenger stations and side tracks and station facilities thereat.

The Mill Company has, and for more than four years has
197 had, a flouring mill of one thousand barrels daily capacity, and continuously operates this mill except on Sundays. This mill is located alongside the tracks of the Missouri Pacific and a short distance from its freight station. The tracks and freight sta-

tions of the two roads are separate a distance of one mile, and the Santa Fe station and station facilities are one mile from the mill. The Mill Company ships from its mill over these two roads substantially its entire product, three-fifths of which is so shipped out of the State of Kansas and into other states, and two-fifths to points within the State of Kansas. The Mill Company purchases a large portion of its grain at Stafford, which is delivered in wagons at the mill; and purchases a large portion of its grain at points distant from Stafford, all of which is shipped to it in car load lots over these two roads, and delivered to it at the mill by the Missouri Pacific. The Mill Company sells its products to dealers, and the larger portion of its output is shipped to customers most conveniently reached by shipping from Stafford by the Santa Fe, and a large portion is shipped to customers most conveniently reached by shipping from Stafford by the Missouri Pacific.

Third.

The Missouri Valley Car Service and Storage Association is an unincorporated voluntary association of a number of railroad companies, having a manager and other employes. The object 198 and the duty of this Association is to represent, serve, protect the interest, and enforce the rights of the members thereof in the matter of the interchange of freight cars, the prompt loading, unloading, and return of cars interchanged, or delivered to shippers, for traffic purposes.

This Association has been in operation for many years, and from a time prior to any of the transactions mentioned in this investigation; and its objects and operations and methods have been generally understood by commercial shippers by car load lots, and generally acquiesced in as a proper instrument for securing to the shipping public the greatest amount of service from the available car supply of the roads composing it. The Association has adopted and had in effect since January 1, 1904, a body of rules, a printed copy of which accompanies these findings.

Fourth.

The lines of the Missouri Pacific and the Santa Fe intersect at a point one mile distant westwardly from the mill and the Missouri Pacific station, and the same distance from the Santa Fe station. As near as practicable to the intersection the Santa Fe in the year 1903 constructed, at its own expense, a transfer track from a connection with its own to a connection with the Missouri Pacific line. At that point and for a half mile eastward the Missouri Pacific line is located 199 in Prairie avenue, a public street of Stafford; and no part of the transfer track is owned by the Missouri Pacific, or on its right of way or private ground. No express contract is shown to exist between the two railroad companies requiring either to use, or to permit the other to use the transfer track, or requiring either to place empty or loaded cars thereon to be taken away or returned by the other. In order for the Missouri Pacific to take cars from the

said transfer track which had been placed thereon by the Santa Fe, or return such cars thereto, it is necessary for it to go entirely off its own track and right of way both in going after cars standing on said Santa Fe transfer track, and in setting loaded cars on the same; the Missouri Pacific not owning and having no control over any part of the said track or of the right of way over which it passes.

Fifth.

Immediately after the construction of the transfer track the Santa Fe began to place thereon empty cars to be by the Missouri Pacific taken therefrom and placed for loading with flour at the Mill Company's mill, or at such convenient position as to enable the Mill Company with its own force to place them at the mill for such loading. At the same time the Missouri Pacific began to take such empty cars from the transfer track and place them for loading with flour at the mill, or in such position as to enable the Mill Company with its own force to place them at the mill for such loading; and 200 on notice that such cars were loaded ready for shipment, to return them to the transfer track to be taken possession of by the Santa Fe. The practice in this matter was: when the Mill Company desired to ship flour from its mill by the Santa Fe it placed its order with the Santa Fe for the number of cars desired; the latter would place the cars on the transfer track; the Missouri Pacific would place them at the mill and when the cars were loaded, return them to the transfer track, charge the Santa Fe two dollars per car for the service, notifying it of the switching: The Santa Fe would take the cars, bill them to destination, collect all freight and pay the Missouri Pacific its switching charges. In no instance did the Missouri Pacific issue Bill of Lading, way bill, or receipt, or present or collect bills for freight or switching charges.

Sixth.

When the Santa Fe received cars loaded with wheat consigned to the Mill Company, it placed them on the transfer track; the Missouri Pacific placed them at the mill; the Mill Company unloaded the wheat from them and reloaded them with flour, and the same practice was followed as in the case of empty cars brought in from the Santa Fe.

Seventh.

In making its applications to the Santa Fe for cars, in no 201 instance did the Mill Company make a deposit of any part of the freight, and in no instance was a deposit of any part of the freight demanded. In receiving orders for, furnishing, transferring or returning cars as hereinbefore outlined, in no instance was any distinction made between cars intended to be used in carrying flour to points out of the state and cars intended to carry to points within the State of Kansas.

Eighth.

The custom and practice described in the fifth and sixth paragraphs prevailed as to both empty and loaded cars from the time the transfer track was constructed uninterruptedly until Aug. 29, 1906; and prevails to the present time in favor of the Mill Company as to cars loaded with wheat consigned to the Mill Company; and still prevails in favor of all industries located on the Missouri Pacific at Stafford making shipments in or out over the Santa Fe in car load lots, except the Mill Company.

Ninth.

I find as a fact that the Santa Fe and the Missouri Pacific hold themselves out and undertake to place for loading on the Missouri Pacific tracks located on the Missouri Pacific line at Stafford, all cars furnished by the Santa Fe required for the shipment of freight in car load lots out over the Santa Fe; and also hold themselves out and undertake to likewise place all loaded cars consigned over the Santa Fe to industries located on the Missouri Pacific at Stafford.

Tenth.

From December 12, 1905, to April 26, 1906, fifty-two cars were taken empty from the transfer track by the Missouri Pacific and placed at or near the mill for loading, were detained after the expiration of forty-eight hours from 7 A. M. of the day following their placing, before they were loaded by the Mill Company and ready to be returned to the transfer track. The total time of such detention was equivalent to the detention of one car eighty-six days. The agent of the Missouri Pacific acting under the direction of the Car Service Association, which for this purpose represented both the Santa Fe and the Missouri Pacific, assessed against the Mill Company a car service or demurrage charge of one dollar per day for each day each of said cars was so detained after the expiration of free time, which assessments amounted to a total charge of eighty-six dollars.

From July 24 to August 14, 1905, twenty-nine cars loaded with wheat taken by the Missouri Pacific from the transfer track and placed at or near the mill to be unloaded and reloaded with flour, were detained after the expiration of the free time allowed, before they were reloaded and ready to be returned to the transfer track. The total time of such detention was equivalent to the detention of one car one hundred and four days.

The agent of the Missouri Pacific acting as above, added to the free time to be allowed these cars to the extent of twenty-six days, for the reason that the Missouri Pacific wholly failed to do any switching or placing of cars on July 26 when there were five cars, and on July 27 when there were six cars, and on July 30 when there were fifteen cars requiring switching and placing; and thereupon assessed against the Mill Company car service charges on account of such detention amount in the aggregate to seventy-eight dollars.

Eleventh.

After the car service charges on the loaded cars had been assessed, the agent of the Missouri Pacific under instructions from the Car Service Association demanded of the Mill Company the payment of the whole of the car service charges assessed, both the eighty-six dollars on account of empty and the seventy-eight dollars on account of loaded cars. Thereupon the Mill Company offered to pay the eighty-six dollars on account of the empty cars, and refused to pay seventy-eight dollars on account of loaded cars, basing its refusal on the ground that the delay and detention of the cars was not caused by its fault, but was caused by the defective, insufficient and inadequate service of the Missouri Pacific in placing the cars for unloading and reloading.

204 The agent of the Missouri Pacific under the instruction of the Car Service Association refused to accept the eighty-six dollars or any sum less than the whole of the two amounts, and demanded the payment of the whole of the two amounts with the understanding that the Mill Company might present a claim for the return of any excess charges it claimed had been made, which claim would be investigated by the Car Service Association, and if it found excess or unjust charges had been assessed, the amount so found would be refunded to the Mill Company. The Mill Company still refused to comply with that demand.

Twelfth.

On August 29, 1906, and after the Mill Company had refused to make payment of the entire claim for car service charges, the Missouri Pacific by the direction of the Car Service Association ceased and refused to make further delivery to the Mill Company of empty cars placed on the transfer track for the use of the Mill Company by the Santa Fe, and still refuses to make such delivery. The only object and purpose of the Car Association in directing, and of the Missouri Pacific in the refusal to make such further delivery of such empty cars to the Mill Company is to compel it to pay the whole of both amounts of car service charges under the understanding described in paragraph eleven by the enforcement of the rules

205 of the Car Service Association. The refusal to make such delivery was not based upon a claim that the compensation paid for the service was not satisfactory, nor upon a claim that any part of such service constituted a part of interstate commerce, nor upon a claim that the Missouri Pacific did not undertake to perform such service.

Thirteenth.

As a result of the refusal to make delivery of empty cars as described in paragraph twelve, the Mill Company when desiring to ship any of its products from Stafford by the Santa Fe is compelled to haul the same in wagons from its mill to the station of the Santa Fe and load into cars from wagons. This entails upon the Mill Company great inconvenience and great additional expense in the management of its business.

Fourteenth.

During the period covered by the car service charges on loaded cars constituting the seventy-eight dollars so demanded, an unusual and heavy demand was being made upon the Missouri Pacific for the transportation to market of a newly harvested crop of wheat then ready for market, along that portion of its line from Conway Springs to Larned in Kansas. The freight service on that portion of
206 its line was performed throughout the year by a single engine and train crew, passing from Conway to Larned and return.

The transfer and switching service performed by the Missouri Pacific hereinbefore described, was performed by this single engine and crew. Ordinarily and by the train schedule, this engine and crew passed through Stafford and performed such transfer and switching service once in the early part and once in the latter part of each day except Sunday; and when so performed with reasonable promptness and regularity, this single engine and crew were capable of performing the service to the satisfaction of the Mill Company. The engine so used was old and frequently defective and out of repair. The single engine and crew were not sufficient or equal to meet the unusual demand of the business of that part of the line during the period mentioned, and perform the transfer and switching service in question with promptness or regularity.

During the period mentioned the Mill Company made its application from time to time to the Santa Fe for such number of cars in addition to the loaded cars consigned to it which it might reasonably anticipate would arrive at the same time, as it deemed necessary in its business, but not for a greater number of cars to be delivered at one time than, together with such loaded cars, it could load within the free time allowed if such empty and loaded cars were properly placed with reasonable promptness.

207

Fifteenth.

The crowded condition of the business on the Missouri Pacific during that period and the general character of its motive power and train crew were well known to its agent, as well also to the Santa Fe, and to the Mill Company.

When the Mill Company placed its applications for cars with the Santa Fe, it could not certainly know the day on which they would be placed on the transfer track; or know with certainty on what day loaded cars consigned to it over the Santa Fe would arrive and be placed on the transfer track; or know that at such times such cars could not be properly placed by the Missouri Pacific with reasonable promptness. The Missouri Pacific did not better or increase its motive power or train service to meet the increased and unusual demand of its business during the period mentioned.

Sixteenth.

I find as a fact that the detention of the loaded cars beyond the free time allowed, on account of which the disputed car service to the amount of seventy-eight dollars was assessed against the Mill

Company, was caused as much by the fault and defective motive power and insufficient train service of the Missouri Pacific, as from any fault or omission on the part of the Mill Company.

208

Seventeenth.

The plaintiff has introduced testimony tending to show the amount of expenses incurred in and about this suit, and amount of reasonable compensation for attorneys' services in conducting it.

I make no findings upon these questions, for the reason that it does not appear that they are included in the order of reference, and therefore not within my province to determine.

I return herewith the transcript of the evidence taken, and the exhibits introduced.

H. C. SLUSS,
Commissioner.

November 8th, 1906.

On the 8th day of December, 1906, the court filed its opinion awarding a peremptory writ of mandamus—which opinion will be found in the case of Larabee Flour Mills Co. v. Mo. Pac. Ry. Co., 74 Kan., pp. 808-823 inclusive, to which reference is here made as a part of this abstract of the proceedings.

The court did not on said date render any judgment for damages to the plaintiff, but allowed the plaintiff ten days from said 8th day of December, 1906, within which to file a claim for damages. On the 15th day of December, 1906, the said plaintiffs filed with the clerk of the Supreme Court their claim for damages, a copy of which is in words and figures as follows, to-wit:

209

In the Supreme Court of Kansas.

No. 15167.

THE LARABEE FLOUR MILLS COMPANY, Plaintiff,
vs.

THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Plaintiff's Claim for Damages.

In compliance with the order and direction of this court, the plaintiff hereby files its claims for damages, which it has necessarily sustained by reason of the unlawful act of the defendant in refusing to perform switching service for the plaintiff, and which claims are as follows:

First. The claim for hauling flour and mill feeds from the mill to the cars on the Santa Fe track; a force of men and teams was necessarily employed to do this transfer; the items to whom paid are embraced in Schedule "A" hereto attached and made a part of this claim and aggregating the sum of \$1,056.39 up to December 8th, 1906.

Second. A like proportion of expense for teams and laborers for hauling like products from the mill to the Santa Fe cars for every mill day since up to the time that the traffic shall be resumed, and which will be for each of such days full \$12.70.

Third. A force of four men employed for $83\frac{1}{2}$ days up to December 8th, 1906, two at the mill and two at the cars, to assist in loading and unloading, being up to December 8th, 1906, $83\frac{1}{2}$ days for four laborers at \$1.50 each and making a total of \$501.00.

210 Fourth. A like item for such labor at an expense of \$6.00 per day for each day subsequent to December 8th, 1906, that the traffic is not resumed by defendant.

Fifth. For a complete shut down of the mill $\frac{1}{2}$ day in November and on December 1st, 3d and 4th, made necessary in consequence of muddy road, making it impossible to operate mill and transfer cars, at a loss of the known profits of the mill of \$250.00 for each day and making an aggregate of \$875.00.

Sixth. It is now coming the season of muddy roads and if the traffic is not resumed there will be a recurrence of times when the mill will be compelled to stop running on account of bad roads, and which loss is liable to be too severe and large not to be taken into account at this time.

Seventh. From November 1st to December 8th, being days when corn commenced to move, there have been 33 days in which the mill has practically done no shipping or grinding corn or corn chops, as it could not get the cars for such purpose; that the corn business comes off the Santa Fe and not the Missouri Pacific; that the mill had an established corn business over the Santa Fe until the transfer was stopped; that it could not be transacted by hauling as the flour transfer monopolized all the facilities for transfer; that the established business of plaintiff's mill has suffered loss in the sum of seventy-five dollars profit each mill day by cutting off this corn business and making a total of 33 days of \$2,475.00.

211 Eighth. Until the traffic is resumed this loss to the business of the mill, in not being able to transact any shipping of corn or corn stuffs, as stated in the 7th item, will be continued until some time in February or March, 1907, and the loss is too severe and will be too great to not provide for such loss.

Ninth. Paid to J. G. Waters, independently of hiring him in this action, \$75.00 for going to Stafford for counsel and advice over the stoppage of this transfer.

Tenth. Paid for three printed briefs filed in this court in this case the sum of \$68.25.

Eleventh. Paid Vandiveer & Martin of Hutchinson, \$25 for counsel and advice relating to the stoppage of this transfer business.

Twelfth. To cash paid out for expenses of F. D. and F. S. Larabee in making 6 trips to Topeka, and counting their time at \$10 per day made necessary in and about this suit and aggregating \$210.00.

Thirteenth. To expenses for three trips to Hutchinson \$9.00.

Fourteenth. To cash paid and plaintiff's agreement to pay Waters & Waters, attorneys' fees in this case, twenty-five hundred dollars (\$2,500.00).

Fifteenth. To further legal services, if this case is taken to the Supreme Court of the United States, whatever such services may be worth.

Respectfully submitted,

THE LARABEE FLOUR MILLS CO.,
By F. D. LARABEE,
By WATERS & WATERS,
Attorneys for Plaintiff.

SCHEDULE A.

Statement.

— — —, 190—.

M-. — — —, in Account with the Larabee Flour Mills Co., Stafford,
Kansas, U. S. A.,

Millers of Kansas Hard Wheat Flours.

Capacity, 1,000 Bbls.

Elevators, 100,000 Bushels.

To Acc't Rendered.

Date.		Due.
9/8.	N. C. Dawson	\$9.60
Do.	Mace Johnson	9.60
Do.	Geo. Hays	9.60
9/15.	N. C. Dawson	17.25
Do.	Mace Johnson	22.65
Do.	E. Sims	4.50
Do.	L. H. Swinger	7.50
Do.	W. T. Johnson	4.50
Do.	H. P. Seens	12.00
9/21.	C. E. Johnson	3.00
9/22.	N. C. Dawson	18.00
Do.	M. Johnson	7.50
Do.	Ed. Sims	7.50
Do.	L. H. Swinger	9.00
Do.	W. T. Johnson	7.50
Do.	C. E. Johnson	7.50
Do.	Hays	4.50
Do.	D. A. Gardner	7.80
Do.	John Johnson	7.50
9/29.	M. Johnson	18.00
Do.	J. M. Johnson	18.00
Do.	A. J. Herrell	15.00
Do.	L. W. Sloan	21.00
213		
Do.	C. E. Johnson	15.00
Do.	Fred Mace	21.00

10/6.	Mace Johnson	15.00
Do.	J. M. Johnson	15.00
Do.	A. J. Herrell	3.00
Do.	L. W. Sloan	3.00
Do.	C. E. Johnson	7.40
Do.	Fred Mace	9.60
Do.	W. T. Johnson	15.00
10/13.	M. Johnson	16.50
Do.	J. M. Johnson	15.00
Do.	W. T. Johnson	15.00
Do.	H. P. Sims	12.00
10/20.	M. Johnson	6.00
Do.	A. J. Herrell	9.00
Do.	W. T. Johnson	5.70
10/24.	M. Johnson	14.25
Do.	A. J. Herrell	9.00
Do.	W. T. Johnson	14.25
Do.	J. M. Johnson	14.25

 \$483.95

	Forward	\$483.95
11/3.	Mace Johnson	18.00
Do.	A. J. Herrell	9.00
Do.	W. T. Johnson	18.00
Do.	J. M. Johnson	18.00
Do.	N. C. Dawson	3.75
Do.	C. E. Johnson	12.75
11/10.	L. W. Sloan	13.50
Do.	M. Hall	23.20
Do.	M. Johnson	18.00
Do.	A. J. Herrell	13.50
Do.	W. T. Johnson	18.00
Do.	J. M. Johnson	16.30
Do.	C. E. Johnson	18.00
Do.	H. P. Sims	12.00
11/17.	M. Johnson	18.00
Do.	W. T. Johnson	18.00

214

Do.	J. M. Johnson	18.00
Do.	C. E. Johnson	18.00
Do.	H. P. Sims	12.00
11/24.	M. Johnson	12.75
Do.	W. T. Johnson	11.25
Do.	J. M. Johnson	11.25
Do.	C. E. Johnson	11.25
Do.	L. W. Sloan	3.00
Do.	W. E. Johnson	14.00
Do.	H. P. Sims	12.00
12/1.	M. Johnson	15.75
Do.	A. J. Herrell	15.75

Do.	W. T. Johnson	15.00
Do.	J. M. Johnson.....	15.00
Do.	C. E. Johnson.....	15.00
Do.	L. W. Sloan.....	15.75
Do.	Ed. Sims	5.25
Do.	N. C. Dawson.....	3.00
Do.	Tom Taylor	3.00
12/8.	Mace Johnson	8.22
Do.	A. J. Herrell	10.95
Do.	W. F. Johnson.....	4.84
Do.	J. M. Johnson.....	12.48
Do.	C. E. Johnson	11.80
Do.	L. W. Sloan.....	8.48
Do.	Ed. Sims	14.41
Do.	N. C. Dawson	14.75
Do.	Tom Taylor	11.48

\$1,056.39

On the 24th day of December, 1906, on due application and filing of petition and assignment of error, a writ of error was granted by the Supreme Court of the United States to the Supreme Court of the State of Kansas, to review the judgment of the Supreme Court of the State of Kansas, entered on the 8th day of December,

215 1906, upon the condition that the defendant, The Missouri Pacific Railway Company, should give to the said plaintiff a good and sufficient bond, in the sum of twenty thousand dollars (\$20,000.00), conditioned that said defendant should prosecute its writ of error to effect, and, if it failed to make good its plea, should pay all damages and costs, said security and bond to be approved by one of the Justices of the Supreme Court of the State of Kansas.

Thereafter, on the 24th day of December, 1906, said defendant executed, and caused to be filed with the clerk of the Supreme Court of Kansas, a bond, a copy of which is as follows, viz:

In the Supreme Court of Kansas.

THE MISSOURI PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.

THE LARABEE FLOUR MILLS COMPANY, a Partnership, Consisting of
F. D. and F. S. Larabee, Defendants in Error.

Bond.

Know all men by these presents, That we, The Missouri Pacific Railway Company, as principal, and B. P. Waggener and J. P. Brown as sureties, are held and firmly bound unto F. D. and F. S. Larabee, as partners, under the firm name of the Larabee Flour Mills Company, in the sum of twenty thousand (\$20,000.00) dollars, to be paid to them, the said F. D. and F. S. Larabee, as said

partners, to which payment, well and truly to be made, we bind ourselves jointly and severally, firmly by these presents.

216 Sealed with our seals, and dated this 24th day of December, 1906.

Whereas, the above-named plaintiff in error seeks to prosecute its writ of error to the United States Supreme Court to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Kansas, in favor of said F. D. and F. S. Larabee, as partners, under the firm name of The Larabee Flour Mills Company, against The Missouri Pacific Railway Company, and to supersede the said judgment rendered therein.

Now, therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute its said writ of error to effect and answer all costs and damages that may be adjudged against it, if it shall fail to make good its plea, then this obligation to be void, otherwise to remain in full force and effect.

THE MISSOURI PACIFIC R'L'Y CO.,
By B. P. WAGGENER, *Gen'l Att'y.*
B. P. WAGGENER.
J. P. BROWN.

Bond approved and to operate as a supersedeas.

W. A. JOHNSTON,
Chief Justice.

Which said bond was approved by Hon. W. A. Johnston, Chief Justice of the Supreme Court of Kansas; and on said date, to-wit, the 24th day of December, 1906, the writ of error was duly issued, and thereafter citation duly served, and transcript of all proceedings duly and properly transferred to and filed with the clerk of the Supreme Court of the United States at Washington, D. C.

217 Thereafter, said cause remained pending in the said Supreme Court of the United States until the — day of January, 1909, when the same was, by consideration and judgment of said Court, affirmed, and the opinion in said cause rendered, and now published in the case of Mo. Pac. Ry. Co., plaintiff in error v. The Larabee Flour Mills Co., defendant in error, reported in 211 U. S., pp. 612-627.

The mandate of the Supreme Court of the United States was duly transmitted to and filed with the Clerk of the Supreme Court of the State of Kansas, and the order of affirmance of the judgment of said Supreme Court of the State of Kansas duly entered.

Thereafter, and by leave of Court, the plaintiffs filed with the Clerk of the Supreme Court of the State of Kansas their amended statement and claim for damages, which is in words and figures as follows, viz:

In the Supreme Court of the State of Kansas.

THE LARABEE FLOUR MILLS COMPANY, Plaintiff,
vs.

THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Amended Statement and Claim by Plaintiff for Damages.

In compliance with the order of this Court, the plaintiff
218 hereby files its amended statement and claim for damages
which it has necessarily sustained by reason of the unlawful
act of the defendant in refusing to perform switching service for the
plaintiff and which it claims are as follows:

First. The claim for hauling flour, grain and mill stuffs and feed
from the mill and elevator of plaintiff to the cars on the Santa Fe
track, a force of men and teams was necessarily employed to make
such transfers, and aggregating the sum of \$2,415.65.

Second. A force of four men, employed for 168½ days, two at
the mill and two at the cars, to assist in loading and unloading at
\$1.50 for each laborer per day, and making a total of \$1,011.00.

Third. For the time of Fred Neumann necessarily occupied in
also overseeing and attending to such transfers, 168½ days at \$2.50
per day, and making a total of \$420.25.

Fourth. For a complete shut down of the mill ½ day in Novem-
ber, 1906, and also for December 1st, 3d, 4th, 24th and 26th, 1906,
January 1, 2, 12, 28, 29, 30 and February 27 and 28, 1907, made
necessary in consequence of muddy and bad roads, making it impos-
sible to operate mill and transfer products by team and labor which
would have been wholly obviated if such transfer service had been
given, at a loss of the known profits of the mill, for 13½ days of
\$250.00 per day and making a total of \$3,375.00.

Fifth. From November 1st, 1906, when corn commenced to move
and be received at the mill, there have been 117 days in which
219 the mill practically did no shipping or grinding of corn or
corn chops as it could not get the cars for such purpose; that
the corn business came off the Santa Fe and not from the Missouri
Pacific, that the mill had an established corn business over the Santa
Fe until the transfer was stopped; that it could not be transacted by
hauling, as the flour transfer monopolized all the facilities and means
of transfer of the mill; that the established business of the mills of
the plaintiff has suffered loss and damage for 117 days in the sum of
one hundred dollars, reasonable profit each mill day, by cutting off
this corn business and making a total of \$11,700.00.

Sixth. For amount paid Vandiveer & Martin of Hutchinson for
coming to Stafford for counsel and advice over and concerning the
stoppage of this transfer service the sum of \$25.00.

Seventh. For the services of C. G. Webb, an attorney of Stafford,
for counsel and advice relating to the stoppage of this transfer, the
sum of \$500.00.

Eighth. Paid to J. G. Waters, independently of hiring him in this

action, for coming to Stafford for counsel and advice over the stoppage of this transfer, the sum of \$75.00.

Ninth. For the reasonable value of the services of Waters & Waters to bring this action and to attend to the same in the Supreme Court of the State of Kansas, the sum of \$2,500.00.

Tenth. For the reasonable value of the services of Waters & Waters in this case in the Supreme Court of the United States, the sum of \$40,000.00.

Eleventh. For cash paid out for printed briefs in the State and United States Supreme Court, the sum of \$193.50.

Twelfth. For the reasonable value of the professional services of John F. Switzer, attorney at law, employed to assist Waters & Waters in the Supreme Court of the United States, the plaintiff in the best judgment of the partners composing said firm, deeming it necessary after considering the momentous and far reaching controversy made, urged and argued in the Supreme Court of the United States and which controversy it could not avoid, the sum of \$3,000.00.

Thirteenth. For the reasonable value of the professional services of the firm of Rossington & Smith, attorneys at law, also employed to present the case of the plaintiff in the Supreme Court of the United States, the plaintiff in the best judgment of the partners composing said firm, deeming it necessary, after considering the momentous and far reaching controversy made, urged and contended for in the Supreme Court of the United States, and which controversy it could not avoid, the sum of \$30,000.00.

Fourteenth. For the railroad fare, hotel bills and reasonable expenses of W. H. Rossington and J. G. Waters in attending on the United States Supreme Court in April, 1908, the sum of \$250 each and making a total of \$500.00.

Fifteenth. For the railroad fare, hotel bills and reasonable expenses of Charles Blood Smith and J. G. Waters in attending on the Supreme Court in October, 1908, the sum of \$480.60.

Sixteenth. For the costs due the plaintiff in the Supreme Court of the United States, the sum of \$148.25.

Seventeenth. To cash paid out for the expenses of F. D. Larabee for eleven trips to Topeka from Stafford, for the expenses of F. S. Larabee for six trips to Topeka from Stafford, and J. D. Larabee sent by them to Topeka from Stafford and for their time being for 2 days each at \$10 per day, and fifteen dollars expenses for each trip, making a sum of \$630 all concerning this case.

Eighteenth. For expenses of J. G. Waters to St. Louis and return amounting to twelve dollars and for two trips of F. D. Larabee to St. Louis and return, expenses and \$10 per day amounting to \$150 and all making a sum of \$160.00.

Nineteenth. For expenses of F. D. Larabee and F. S. Larabee in making three necessary trips to Hutchinson from Stafford, three days at \$10.00 per day and expenses nine dollars and making the sum of \$39.00.

Twentieth. For cash advanced on the costs of stenographer before Hon. H. C. Sluss, the sum of \$25.00.

Twenty-first. For three days' necessary attendance by F. D. Larabee before Hon. H. C. Sluss in the previous taking of testimony by him at \$10.00 per day, the sum of \$30.00.

Twenty-second. For — days' necessary attendance by F. D. Larabee before Hon. H. C. Sluss at the coming taking of testimony at \$10.00 per day, the amount to be ascertained.

222 Twenty-third. For necessary expenses of railway fare, hotel bills and other items incurred by reason of the coming taking of testimony, the amount to be ascertained.

The switching service was closed and denied to plaintiff on August 29th, 1906, to March 18th, 1907, a period of 201 days in all.

Recapitulation.

1st Claim	\$2,415.66
2d "	1,011.00
3d "	420.25
4th "	3,375.00
5th "	11,700.00
6th "	25.00
7th "	500.00
8th "	75.00
9th "	2,500.00
10th "	40,000.00
11th "	193.50
12th "	5,000.00
13th "	30,000.00
14th "	500.00
15th "	480.60
16th "	148.25
17th "	630.00
18th "	160.00
19th "	39.00
20th "	25.00
	<hr/>
	\$99,198.26
21st "	
22d "	
23d "	

ROSSINGTON & SMITH,
WATERS & WATERS,
Attorneys for Plaintiff.

223 Thereupon, and on the 5th day of April, 1909, the Supreme Court of the State of Kansas made an order referring the subject matter in controversy, as made by such claim and demand for damages, to Hon. Henry C. Sluss, as Commissioner, to take the testimony, and report findings of fact and conclusions of law—which said order is in words and figures as follows:

"It is further ordered that the motion of the plaintiff for leave to amend its statement of damages be allowed, and that ten days

from this date be given within which to file such amendment. It is further ordered that the motion of the plaintiff for the appointment of a commissioner to take testimony, and to make findings therefrom, be allowed, and it is now ordered that H. C. Sluss, of Wichita, Kansas, be and he hereby is appointed a commissioner of this court to take testimony in this case. The said commissioner is hereby authorized and empowered to summon witnesses, and compel their attendance, and the giving of their testimony before him; to preserve order at the place where the testimony is being taking; to hear and record the testimony, and to do all things necessary and requisite thereto.

It is further ordered that the commissioner be hereby required to file his oath of office in the office of this court, and to commence the taking of testimony at such time as may be agreed upon between him and counsel herein.

It is further ordered that the said commissioner, after taking testimony, make therefrom findings of fact and conclusions of law, to be submitted to this court with his report, which he shall file in the office of the clerk of this court."

224 In the Supreme Court of the State of Kansas.

THE LARABEE FLOUR MILLS COMPANY, Plaintiff,

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Objections and Exceptions to the Amended Statement and Claim of Plaintiff for Damages.

The plaintiffs and defendant having entered into the following stipulation, to-wit:

"In the Supreme Court of the State of Kansas.

THE LARABEE FLOUR MILLS COMPANY, Plaintiff,

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Stipulation.

It is stipulated and agreed by and between the respective parties hereto that each party has reserved the right to present any objection or exception to the Referee or to the Court to any question, evidence, matter or proceeding herein, to the same purpose and with like effect as if such objection or exception had been made and exception noted at the proper time; and neither party shall be held to have waived any right to present to the Referee or to the Court
 225 any objection or exception by reason of having failed or neglected to have the same noted or made a matter of record

at the time when such objection or exception might or should have been made, and record thereof preserved.

ROSSINGTON & SMITH,
JOHN F. SWITZER,
WATERS & WATERS,
Attorneys for Plaintiff.
B. P. WAGGENER,
Attorney for Defendant."

The defendant makes and presents its formal objection and exceptions to the various items and claims for damages hereinafter set forth, as follows:

First.

"The claim for hauling flour, grain and mill stuffs and feed from the mill and elevator of plaintiff to the cars on the Santa Fe track, a force of men and teams was necessarily employed to make such transfers, and aggregating the sum of \$2,415.65."

The defendant objects and excepts to the foregoing item, for the reason that the same includes claimed items and elements of damage which accrued subsequent to the rendition of the final judgment herein, to-wit: on December 8th, 1906; and subsequent to December 24th, 1906, and after proceedings had been instituted in the Supreme Court of the United States, and a supersedeas bond had been given and approved, and ordered to operate as a supersedeas, and 226 the jurisdiction and power to hear, try and determine such elements of damage was removed and withdrawn from the jurisdiction of this court, and it had no power or authority to consider the same; and the said plaintiffs, if entitled to recover anything on such claim of damage subsequently accruing, should seek such recovery on the said supersedeas bond, and not by virtue of any statute of the State of Kansas, but should be confined, if entitled to recover damages at all in this proceeding, to all damages which accrued, if any, prior to the institution of such proceedings in the Supreme Court of the United States, and prior to the rendition of the judgment of this court on December 8th, 1906; and because, as shown by the evidence taken on the hearing thereof, the said claimed item of damage is speculative, uncertain and conjectural, and not a subject of judicial investigation herein.

Second.

"A force of four men, employed for 168½ days, two at the mill and two at the cars, to assist in loading and unloading, at \$1.50 for each laborer per day, and making a total of \$1,011.00."

The defendant makes the same objection and interposes the same exception as to the first claim for damage herein, reserving the right, under the stipulation aforesaid, to interpose other objections and exceptions on the hearing hereof.

227

Third.

"For the time of Fred Neumann necessarily occupied in also overseeing and attending to such transfers 168½ days, at \$2.50 per day, and making a total of \$420.25."

The defendant makes the same objection and interposes the same exception as to the first claim for damage herein, reserving the right, under the stipulation aforesaid, to interpose other objections and exceptions on the hearing hereof.

Fourth.

"For a complete shut-down of the mill ½ day in November, 1906, and also for December 1st, 3rd, 4th, 24th and 26th, 1906, January 1, 2, 12, 28, 29, 30, and February 27 and 28, 1907, made necessary in consequence of muddy and bad roads making it impossible to operate mill and transfer products by team and labor, which would have been wholly obviated if such transfer service had been given, at a loss of the known profits of the mill, for 13½ days, of \$250.00 per day—making a total of \$3,375.00."

The defendant makes the same objection and interposes the same exception as to the first claim for damage herein, reserving the right, under the stipulation aforesaid, to interpose other objections and exceptions on the hearing hereof.

228

Fifth.

"From November 1st, 1906, when corn commenced to move and be received at the mill, there have been 117 days in which the mill practically did no shipping or grinding of corn or corn chops, as it could not get the cars for such purpose; that the corn business came off the Santa Fe, and not from the Missouri Pacific; that the mill had an established corn business over the Santa Fe until the transfer was stopped; that it could not be transacted by hauling, as the flour transfer monopolized all the facilities and means of transfer of the mill; that the established business of the mills of the plaintiff has suffered loss and damage for 117 days in the sum of one hundred dollars, reasonable profit each mill day, by cutting off this corn business, and making a total of \$11,700.00."

The defendant here interposes the same objection and exception to this claim and demand as interposed to Claim and Demand No. 1; and the further objection that the same is based upon speculation, and not proper to be construed as an element of damage in the controversy herein, and because the said interruption of such switching service was not the direct or proximate cause of the shut-down of said mill, or the damage claimed to have been sustained by said plaintiff by reason thereof; and because, further, the said alleged damage, and each part thereof, accrued subsequent to the rendition of the judgment herein on the 8th day of December, 1906, and subsequent to December 24th, 1906, after proceedings had been instituted in the Supreme Court of the United States to review the decision and judgment of this court, and this court has

229

no power or jurisdiction to hear, try and determine the same; and said defendant, under the within and foregoing stipulation, here reserves the right to interpose any other objection or exception on the presentation hereof which may properly be interposed to said item of damage, or any part thereof.

Sixth.

"For amount paid Vandiveer & Martin, of Hutchinson, for coming to Stafford, for counsel and advice over and concerning the stoppage of this transfer service, the sum of \$25.00."

The defendant specially objects and excepts to this item or claim for the reason that (Sec. 5193, Gen'l Stat. 1901.): "If judgment be given for the plaintiff, he shall recover the damages which he shall have sustained, to be ascertained by the court or jury, or by referee, as in civil action, and costs; and a peremptory mandamus shall also be granted to him without delay;" under which such item and claim of damage, as claimed, as unconstitutional and void, because the Supreme Court of the State of Kansas, in construing such section of the Civil Code, holds and decides that the words "costs" and "damages," as therein contained, include the reasonable attorneys' fees of the plaintiff in such a proceeding, and thereby denies to the defendant

in this action the equal protection of the law, and deprives
230 it of its property without due process of law; and because,

further, that, under the construction placed upon such section by the Supreme Court of Kansas, the plaintiff in this action, being an action to enforce a private right and not a public duty, has claimed to be entitled to recover attorneys' fees, in case of his success in the prosecution of a proceeding to enforce such private right—whereas the said defendant is not permitted, under the construction so placed upon such act, to recover any attorneys' fees or costs or expense of litigation, in event it should be successful in the defense of such action; that the enforcement of such statute, under the construction placed upon it by the Supreme Court of the State of Kansas, is in violation of the 14th Amendment to the Constitution of the United States, and the same is therefore absolutely void and non-enforcible, and the said plaintiffs are not entitled to recover any attorneys' fees by reason of such statute, and the construction placed upon it by the Supreme Court of the State of Kansas.

Seventh.

"For the services of C. G. Webb, an attorney of Stafford, for counsel and advice relating to the stoppage of this transfer, the sum of \$500.00."

The same objection is here interposed by said defendant as interposed to the preceding claim, Item No. 6 herein; and, under the foregoing stipulation, defendant reserves the right to
231 present any other objection or exception that may be properly presented on the hearing hereof.

Eighth.

"Paid to J. G. Waters, independently of hiring him in this action, for coming to Stafford for counsel and advice over the stoppage of this transfer, the sum of \$75.00."

The same objection is here interposed by said defendant as interposed to Item No. 6 herein; and, under the foregoing stipulation, defendant reserves the right to present any other objection or exception that may be properly presented on the hearing hereof.

Ninth.

"For the reasonable value of the service of Waters & Waters to bring this action, and to attend to the same in the Supreme Court of the State of Kansas, the sum of \$2,500.00."

The same objection is here interposed by said defendant as interposed to Item No. 6 herein; and, under the foregoing stipulation, defendant reserves the right to present any other objection or exception that may be properly presented on the hearing hereof.

232

Tenth.

"For the reasonable value of the services of Waters & Waters in this case in the Supreme Court of the United States, the sum of \$40,000.00."

The same objection is here interposed by said defendant as interposed to Item No. 6 herein; and, under the foregoing stipulation, defendant reserves the right to present any other objection or exception that may be properly presented on the hearing hereof.

Eleventh.

"For cash paid out for printed briefs in the State and United States Supreme Court, the sum of \$193.00."

Defendant objects and excepts to the foregoing item because such item of damage, if existing, did not accrue as a proximate result of the interruption of such switching service, and because this Court or Commissioner has no power or authority to consider any item or claim for expense of litigation, printing briefs, or otherwise, in the Supreme Court of the State of Kansas or in the Supreme Court of the United States, and that to allow such item, or any part thereof, would be in violation of the Constitution of the United States, and would deny to said defendant the equal protection of the law, in this: that, under the statutes of the State of Kansas, parties

233 litigant in other proceedings are not entitled to recover such cost or expense of such litigation, and the said item, if allowed, would be a discrimination in favor of said plaintiffs and against the said defendant, and would deprive said defendant of the equal protection of the laws, in violation of the Constitution of the United States.

Twelfth.

"For the reasonable value of the professional services of John F. Switzer, attorney at law, employed to assist Waters & Waters in the

Supreme Court of the United States, the plaintiff, in the best judgment of the partners composing said firm, deeming it necessary, after considering the momentous and far-reaching controversy made, urged and argued in the Supreme Court of the United States, and which controversy it could not avoid, the sum of \$5,000.00."

The defendant objects and excepts to the foregoing item for professional services of John F. Switzer, attorney at law, employed to assist Waters & Waters in the Supreme Court of the United States, for the reason that this Court or Commissioner has no power, jurisdiction or authority to allow any such claim or demand made by the said plaintiffs, because it is provided by the Judiciary Act of Congress as follows, viz.:

"Every justice or judge signing a citation on any writ of error shall, except in cases brought up by the United States, or by direction of any Department of the Government, take good and sufficient security that the plaintiff in error or the appellant shall prosecute his writ or appeal to effect, and, if he fail to make his plea good, shall answer all damages and costs, where the writ is a supersedeas, and stays execution, or all costs only where it is not a supersedeas, as aforesaid."

"Writs of error from the Supreme Court to a state court in cases authorized by law shall be issued in the same manner and under the same regulations, and shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States."

"Where, upon a writ of error, judgment is affirmed in the Supreme Court or a circuit court, the court shall adjudge to the respondent in error just damages for his delay, and single or double costs, at its discretion."

Under such statutes and laws of the United States, this Court has no power, authority or jurisdiction to consider the claim and demand for damages on account of attorneys' fees for services rendered in such proceedings in error from the Supreme Court of the United States to the Supreme Court of Kansas; and for the further reason that, if the said plaintiffs were entitled to any damages, their application therefor should be made to the Supreme Court of the United States, or in an independent proceeding brought on the supersedeas bond so approved and allowed as a supersedeas by the

Chief Justice of this state on December 24th, 1906; and because, further, to allow such claim would be violative of the Constitution of the United States, and especially the 14th Amendment thereof, which prohibits any state from denying to any person, company or corporation the equal protection of the laws, and prevents any state from depriving any person, company or corporation of its property without due process of law; and because of such Judiciary Act, the sections of which are hereinbefore referred to, this Court is deprived of all jurisdiction to consider or determine any such question or element of damage in a proceeding of this kind; and because, further, the Supreme Court of the United States, in affirming the judgment of this court rendered on December 6th, 1906, allowed to said plaintiffs, on account of attorneys'

fees, the sum of \$20.00, and assessed the same against the said defendant—which order and judgment of the said Supreme Court of the United States was paid and satisfied by the said defendant, and the said sum of \$20.00 received by the said plaintiffs in full of attorneys' fees, as so allowed by said court.

The defendant, under the within and foregoing stipulation, reserves the right to interpose and make any other proper objections and exceptions to the within and foregoing item of damage, on presentation of the same.

Thirteenth.

236 "For the reasonable value of the professional services of the firm of Rossington & Smith, attorneys at law, also employed to present the case of the plaintiff in the Supreme Court of the United States, the plaintiff, in the best judgment of the partners composing said firm, deeming it necessary, after considering the momentous and far-reaching controversy made, urged and contended for in the Supreme Court of the United States, and which controversy it could not avoid, the sum of \$30,000.00."

The defendant here interposes the same objection and exception as is interposed to Item No. 12 herein, and with the same reservation and objection thereto.

Fourteenth.

"For the railroad fare, hotel bills and reasonable expenses of W. H. Rossington and J. G. Waters, in attending on the United States Supreme Court in April, 1908, the sum of \$250.00 each, and making a total of \$500.00."

The defendant here interposes the same objection and exception as is interposed to Item No. 12 herein, and with the same reservation relative thereto.

Fifteenth.

237 "For the railroad fare, hotel bills and reasonable expenses of Charles Blood Smith and J. G. Waters, in attending on the Supreme Court in October, 1908, the sum of \$480.60."

The defendant objects to the foregoing item, and excepts thereto, because the same is not a proper subject for consideration by this court or the Commissioner; that this court has no jurisdiction in the premises, and to allow the said plaintiff said expenses and item would be a denial to the said defendant of the equal protection of the law, and would be violative of the Constitution of the United States, and the statutes and laws made in pursuance thereof.

Sixteenth.

"For the costs due the plaintiff in the Supreme Court of the United States the sum of \$148.25."

Defendant asserts that judgment was rendered for the above item of costs against the defendant, and, in due time, the same was paid, and has been received by said plaintiffs, and said judgment so

entered against the said defendant in the Supreme Court of the United States duly satisfied.

Seventeenth, Eighteenth, Nineteenth, Twentieth, Twenty-First, Twenty-Second and Twenty-Third.

"17th. To cash paid out for the expenses of F. D. Larabee for eleven trips to Topeka from Stafford, for the expenses of F. S. Larabee for six trips to Topeka from Stafford, and J. D. Larabee 238 sent by them to Topeka, from Stafford, and for their time, being for two days each, at ten dollars per day, and fifteen dollars expenses for each trip, making a sum of \$630, all concerning this case."

"18th. For expenses of J. G. Waters to St. Louis, and return, amounting to twelve dollars, and for two trips of F. D. Larabee to St. Louis and return, expense and \$10 per day, amounting to \$150, and all making a sum of \$160.00."

"19th. For expenses of F. D. Larabee and F. S. Larabee in making three necessary trips to Hutchinson from Stafford, three days at ten dollars per day and expenses, nine dollars, and making the sum of \$39.00."

"20th. For cash advanced on the costs of stenographer before Hon. H. C. Sluss, the sum of \$25.00."

"21st. For three days' necessary attendance by F. D. Larabee before Hon. H. C. Sluss, in the previous taking of testimony by him, at ten dollars per day, the sum of \$30.00."

"22nd. For ——— days' necessary attendance by F. D. Larabee before Hon. H. C. Sluss, at the coming taking of testimony, at ten dollars per day—the amount to be ascertained."

"23rd. For necessary expenses of railway fare, hotel bills and other items incurred by reason of the coming taking of testimony, the amount to be ascertained."

The defendant excepts and objects to each of the foregoing items or claims for damages, because the same are not proper elements of damage, involving the expense of litigation, and to 239 award or allow the same to the said plaintiffs would deny to said defendant the equal protection of the law, and same are not such elements of damage as are authorized to be recovered, under the statutes of the State of Kansas.

Defendant here specially, under said stipulation hereinbefore copied, reserves to itself the right to object and except to all of the foregoing items mentioned and claimed by the said plaintiff, on the hearing before the commissioner and before the court, and to assign any proper reason, objection or exception in support of the contention that the same, or any or either thereof, should not be allowed or considered by the commissioner or by the court.

B. P. WAGGENER,
Attorney for Defendant,
The Missouri Pacific Railway Company.

And thereafter the said commissioner proceeded to take the testimony offered by the respective parties, on account of such claim and demand for damages.

240 *Abstract of Evidence on Account of the Damages Claimed for Interruption of Operation of Plaintiff's Mill During the Pendency of Such Proceedings in Court.*

F. D. LARABEE:

The Larabee Flour Mills Company is a partnership composed of my brother, Frank S. Larabee, and myself (Rec., Vol. 1, p. 6). Previous to August 27th, 1906, after the construction of the transfer track by the Santa Fe Company, the charge for transferring the cars over this track was two dollars per car. The first of each month the Santa Fe agent would render us a statement showing the number of cars we had transferred to the mill, and we would pay that company two dollars per car, on that statement, after the service had been performed by the Missouri Pacific Company. This arrangement continued for a period of approximately three years (Rec., Vol. 1, p. 8). The arrangement was terminated, as I remember, August 27th, 1906 (Rec., Vol. 1, p. 9). Since the interruption of the service on August 27th, 1906, we continued to do business over the Santa Fe road, by hauling the stuff over to the Santa Fe tracks by team—a distance of about one mile. About three-fourths of our grain and milling business was transacted with the Santa Fe Company (Rec., Vol. 1, p. 14). From the date of the institution of the switching service, about three years previous to August 27th, 1906, we 241 had outbound 2,505 cars of flour and milling stuff. That included some wheat, but it was a very small portion of it. The inbound business was approximately 579 cars of wheat, and more than 80 cars of flour, 40 cars of fuel oil, and 150 cars of coal. Of the outbound cars, 488 were destined to points in Kansas, and 2,017 to points outside of Kansas (Rec., Vol. 1, p. 16). The expenses in relation to the transfer of this traffic by team, instead of in cars, since August 29th, 1906, to the 27th day of October, 1906, were \$535.85 (Rec., Vol. 1, p. 19). That consists of the wages we paid teams engaged in hauling, and the men we are required to have to stow the stuff away in the cars at the Santa Fe. The men are paid \$1.50 per day; the teams \$3.00 per day. After the product had been hauled over the transfer track, the only expense we would have been compelled to pay would be the switching charge of two dollars per car. I estimate our loss per day at \$21.00 (Rec., Vol. 1, p. 21). My judgment is that the number of cars we switched per day prior to August 29th, 1906, would be from six to seven in and out (Rec., Vol. 1, p. 38). Something like four out and two in; possibly four out and three in. During the three years preceding August 29th, 1906, and after the installation of the transfer track, there was shipped over the transfer track 579 cars, or on an average of not quite two cars per day, of wheat and corn (Rec., Vol. 1, p. 39). About three-fifths of the business in and out prior to August 29th, 1906, was

over the Santa Fe, and two-fifths over the Missouri Pacific (Rec., Vol. 1, p. 51).

242 The Larabee Flour Mills Company was a partnership consisting of myself and my brother, F. S. Larabee (Rec., Vol. 2, p. 322). Our mill at Stafford had a capacity of seven hundred barrels of flour per day (Rec., Vol. 2, p. 323). Owing to the fact that we could not get Santa Fe cars at the mill, and the Missouri Pacific Company were unable to furnish any cars during this period, we were forced to shut the mill down, because our store room became filled up (Rec., Vol. 2, p. 326). During the thirteen and a half days' shut down we lost nearly \$160 a day profit (Rec., Vol. 2, p. 328). Based upon our established business through the preceding years, our profit would have been not less than ten cents per hundred and from that up to fifteen cents. Sometimes we made as high as \$125 per car (Rec., Vol. 2, p. 331.) During the time the mill was shut down we were unable to operate (Rec., Vol. 2, p. 336). During the time the mill was shut down, it was overhauled and some repair work was done (Rec., Vol. 2, p. 336). We usually take advantage of any holiday to repair machinery, and I will not say that we did not take advantage of this shut-down to repair our machinery (Rec., Vol. 2, p. 337). I do not know whether there are any records in our vault showing profits of the mill during the years preceding September 1st, 1906 (Rec., Vol. 2, p. 338). I do not know price of corn during any of the time covered by the claim for damages account of shut-down of the mill (Rec., Vol. 2, p. 339). I cannot tell how much per hundred we sold corn chops for during the time mentioned in this claim. It is possible we have records to in-

243 dicate it. I do not know what we were paying for wheat during this same period. During this period of suspension of switching service, so far as flour capacity of the mill was concerned, it ran uninterruptedly until some time late in March, when we shut down and did some repair work at the mill (Rec., Vol. 2, p. 340). In making the estimate of our claim for loss account being unable to ship corn, we estimated the amount of corn goods we would get for grinding, and the reasonable profit we could have made. I cannot say that we ever ran our mill at a capacity of 100,000 pounds per day for 117 days. Neither would I attempt to say how many days (Rec., Vol. 2, p. 345). I do not believe we have any record showing what the average corn business of the mill was. Our claim for damages on account of corn is based upon our maximum capacity, but not upon our maximum profit (Rec., Vol. 2, p. 346). Our profit for the year 1906 was \$42,000.00; that is from July 1st, 1906, to July 1st, 1907 (Rec., Vol. 2, p. 348). That does not include any day we did not run (Rec., Vol. 2, p. 349). I would have to look up my records to tell what our profits were for the preceding year. I could not do it without such records (Rec., Vol. 2, p. 350). The profit which we lost the thirteen and a half days we were shut down I figure at \$140 per day. We estimate \$140 for the flour (Rec., Vol. 2, p. 351). Our expenses include my salary of two hundred dollars per month (Rec., Vol. 2, p. 352). It would be a hard thing for me to estimate the daily output of our mill during the three years pre-

ceding the destruction of the mill (Rec., Vol. 2, p. 443).

244 We have no record with reference to the number of days we were shut down or did not run the three years preceding the destruction of the mill (Rec., Vol. 2, p. 444). The only year I am prepared to testify to as to net profits was from July, 1906, to July, 1907, when it was \$42,000 (Rec., Vol. 2, p. 446).

"Q. I wish you would state to the court what your expenses have been, and how, in relation to the transfer of this traffic by team instead of in cars, since they have ceased on August 29th this transfer?"

A. The expenses until the 27th of this month have been \$535.85." (Rec., Vol. 2, p. 520.)

We filed a statement with the clerk of the Supreme Court in December, 1906, which was honestly prepared by our bookkeeper, and I afterwards checked it with him. That statement filed in December, 1906, was a correct transcript of our expenses from the book (Rec., Vol. 2, p. 521). That statement was correct (Rec., Vol. 2, p. 522). The statement that was filed on December 15th, 1906, was intended to be correct (Rec., Vol. 2, p. 523). That statement was prepared by our bookkeeper under instructions to make it correct, and it was taken from our books by a bookkeeper who is a competent man (Rec., Vol. 2, p. 525). The statement as to profits, or loss of business, was based upon estimates (Rec., Vol. 2, p. 528). If I testified that our loss was \$21.00 per day at a former hearing before the Commissioner, that was correct (Rec., Vol. 2, p. 529). I have no

245 record in my possession which will show a single period in the existence of our mill, during any month—August, September, October, November and December—of a preceding year, when we shipped out over the Santa Fe as many cars as we did for the same months during the year 1906 (Rec., Vol. 2, p. 531). During the years 1904 and 1905 we did not ship out even approximately as much during the months of August, September, October, November and December of those years, as we did in the year 1906 (Rec., Vol. 2, p. 532). We got all the cars from the Santa Fe we required from August, 1906, to December, 1906, because we kept our mill going whenever it was possible to run it, and it was going during all that time (Rec., Vol. 2, p. 534). Our record shows that we shipped, during the month of September, 1904, 48 cars on Missouri Pacific, and 27 on Santa Fe (Rec., Vol. 3, p. 1430). The month of October shows 52 on Santa Fe and 68 on Missouri Pacific; month of November shows 52 on Santa Fe, and 71 on Missouri Pacific; month of December shows 32 on Santa Fe, and 47 on Missouri Pacific; month of January, 1905, shows 53 on Santa Fe, and 65 on Missouri Pacific; month of February, 1905, shows 53 on Santa Fe, and 52 on Missouri Pacific; month of March, 1905, shows 76 on Santa Fe, and 80 on Missouri Pacific; month of September, 1905, shows 102 on Santa Fe and 75 on Missouri Pacific; month of October, 1905, shows 92 on Santa Fe, and 58 on Missouri Pacific; month of November, 1905, shows 104 on Santa Fe, and 51 on Missouri Pacific (Rec., Vol. 3, p. 1431); month of December, 1905, shows 98 on Santa Fe, and 33 on Missouri Pacific; month of January, 1906, shows 107 on

246 Santa Fe, and 63 on Missouri Pacific; month of February, 1906, shows 72 on Santa Fe, and 42 on Missouri Pacific;

month of March, 1906, shows 87 on Santa Fe, and 89 on Missouri Pacific (Rec., Vol. 3, p. 1432). There was no increase in the capacity of the mill from September 1st, 1904, to the date it was burned, July, 1907. I do not know of any other item of expense incurred in hauling this flour from our mill to the Santa Fe track between the first day of September, 1906, and the 8th day of December, 1906, other than that stated in Schedule A (Rec., Vol. 3, p. 1433). The amended statement for damages on account of the shut down of the mill—\$250 for each day, and making an aggregate of \$875—was up to the 8th day of December, 1906, and does not include anything subsequent to December 8th, 1906 (Rec., Vol. 3, p. 1435). The total loss, as claimed by us, for the months of September, October, November, and up to December, 1906, is \$4,907.39 (Rec., Vol. 3, p. 1436). Provided the Missouri Pacific had furnished the cars, the percentage of our volume of business to competitive points between September 1st, 1906, and December 8th, 1906, which could have been handled by the Missouri Pacific, independent of the transfer-track, was about eighty-five per cent, not taking into consideration the transient tonnage (Rec., Vol. 3, p. 1437). We have no item on our books showing a shut down of the mill for thirty-three days, and a consequent loss of \$2,475.00, at the rate of \$75 per day in the profits on account of being unable to ship corn. We arrive at \$75

profit each mill day in the corn business by estimating the
247 volume of business we could do and the profit which we knew was in the business at that season (Rec., Vol. 3, p. 1438).

We have no record or book showing the profit we made per day in the corn business for the corresponding months of September, October, November and December, 1904 and 1905 (Rec., Vol. 3, pp. 1438-9). During the months of September, October, November and December, 1906, our mill was operated to its full capacity in the flour business (Rec., Vol. 3, p. 1439). We could have operated the corn plant if we had shut down the flour end of the business (Rec., Vol. 3, p. 1440). Taking the number of cars shipped, as shown by the schedule, which I present, the business of the mill was larger for the months I have spoken of than ever before in the history of the mill. Our expenses by reason of the interruption of the switching service for the months of December, 1906—after December 8th, 1906—January, February and March, 1907, were about the same as for the preceding months of September, October and November (Rec., Vol. 3, p. 1441). During the months of September, October, November and up to December 8th, 1906, I presume we did grind corn in the mill. My recollection is that the corn we ground in the mill—corn chops and things of that kind—from September 1st, 1905, to April 1st, 1906, was comparatively small (Rec., Vol. 3, p. 1448). We operated the plant very little for corn during that period. From the time the mill was constructed down to September 1st, 1906, it was operated comparatively little for corn chops, but principally for flour.

248 "Q. Can you give some idea, approximately, of the volume of corn grinding business you did from September 1st, 1904, to April 1st, 1905?

A. No, Mr. Waggener, I cannot (Rec., Vol. 3, p. 1449).

Q. Could you from September 1st, 1905, to April 1st, 1906?

A. No, I could not do that. I don't remember the conditions.

Q. You haven't any idea?

A. No, it would be very vague.

Q. It would be a guess?

A. Yes.

Q. Then how can you tell that your profit—that the profit from your mill for the corn business for one hundred and seventeen days was seventy-five or one hundred dollars a day, if you have nothing but a guess to base it on?

A. During that period it was known to me by investigation, and by being in touch with other mills, that the corn business for the mills located in that section was the best of any year they had ever known.

Q. But, as a matter of fact, that was not based upon any past experience, but was a pure speculative matter?

A. Each year governs itself. Now that year was a particularly good year. We did some corn business from our corn elevator.

Q. In fixing your profits, your own profits of seventy-five dollars, you say it wasn't in your original statement, you say seventy-five dollars, and in your amended statement one hundred dollars a day. That was purely speculative, was it not?

A. Not entirely, because we were in touch with conditions, and we did do corn business.

249 Q. It was largely speculative?

A. We had to estimate it some from what we could gather.

Q. Your past experience did not justify any such guess (Rec., Vol. 3, p. 1450)?

A. We might have had years that would be just as good. I don't remember one that was quite as good as that particular year. I think we confirm this by the testimony of other mills here in this state.

Q. As far as 1903, 1904 and 1905 is concerned, you have no recollection, except a very vague one, as to what your profits might have been?

A. I wouldn't make a comparison.

Q. The estimates made for this extraordinary good year is based upon the speculation in the market—whether you could buy the corn, and whether you could sell it or not?

A. It was a business proposition to buy and sell the product." (Rec., Vol. 3, p. 1451.)

The testimony of F. D. Larabee shows that his estimate of loss of profits which they might have made but for the interruption of switching service is based upon estimates and speculation, and not by any comparison of the volume of business or profits for preceding years. It shows a larger net profit (\$42,000.00) from July 1st, 1906, to July 1st, 1907, than ever before in their mill operations at Stafford. It also shows beyond question that the mill was operated at its full capacity from August 29th, 1906, to April 1st, 1907—when the switching service was resumed.

250 FRANK S. LARABEE:

I am an equal partner in the Larabee Flour Mills Company. I am acquainted with the switching service that has been rendered for this mill in the past (Rec., Vol. 1, p. 198). At the time the switching service was interrupted our mill was running to its full capacity (Rec., Vol. 2, p. 377). From July 1st, 1906, to July 1st, 1907, our mill cleared approximately \$42,000. The rainy days were a loss to us, from the fact that our expenses went on (Rec., Vol. 2, p. 378). Our mill was shut down very few days outside of the fifty-two Sundays (Rec., Vol. 2, p. 383). Our net profit for the preceding year was between \$30,000 and \$40,000. The profits on the corn crop was figured in this \$42,000 for the year July 1st, 1906, to July 1st, 1907. The little corn business we did we did over the Missouri Pacific (Rec., Vol. 2, p. 384). The Missouri Pacific properly and at all times took all our loaded cars consigned to the Santa Fe during the entire period of this controversy (Rec., Vol. 2, p. 490), and we at all times got all the cars consigned to us over the Santa Fe—loaded cars (Rec., Vol. 2, p. 491). If the evidence shows that the average of cars loaded that were shipped in and sent back was six or seven cars a day, it was up to our requirements (Rec., Vol. 2, p. 492).

The witness here shows conclusively that their computation as to the volume of business interrupted by reason of the shutting
251 off of the switching service is based upon an erroneous theory (Rec., Vol. 2, pp. 492-494).

“Q. Now, during the period in controversy, August 1st, 1906, to April 30th, 1907, you shipped 728 cars via the Santa Fe and 263 cars via the Missouri Pacific, making a total of 991 cars or 77 cars less than the previous year?

A. Yes, sir.

Q. So that for the same period of time you did substantially the same volume of business during the same last six months, did you not?

A. Yes, but Mr. Waggener, that isn't a fair comparison (Rec., Vol. 2, p. 495).

Q. Why?

A. Because some years some trade in certain lines is better than others. It appears during that last period you mentioned the corn business was especially good—which wasn't true the year before.

* * * * *

Q. The question I ask you is, you cannot base prospective profits of six months of that year upon any previous six months?

A. No, I should judge not.

Q. That is, each six months must be governed by itself?

A. By the condition, yes, sir (Rec., Vol. 2, p. 496).

* * * * *

Q. Assuming this statement to be correct, if the Missouri Pacific had furnished the cars on your demand, you could have shipped over the Missouri Pacific to common points of this 13,971,305 pounds of freight 8,364,052 pounds?

A. Yes, sir.

Q. That would be right, wouldn't it?

A. Yes, sir.

252 Q. And that entire 8,364,052 pounds of freight you have charged for as an item of damage in hauling from your mill over to the Santa Fe?

A. Yes, sir.

Q. Just as I stated, if they would have furnished the cars, it could have been shipped over the Missouri Pacific to common points?

A. Yes, sir.

Q. That would leave 5,607,253 pounds of freight which could not have been shipped out of your mill to common points?

A. Yes, sir (Rec., Vol. 2, p. 497).

Q. But is it not a fact, with the exception of the fifteen per cent you refer to in your lists, there, it all could have been shipped to initial points going over the Missouri Pacific?

A. I think so" (Rec., Vol. 2, p. 498).

The witness testifies that many times cars were kept nineteen and twenty days at a time (Rec., Vol. 2, p. 500).

"Q. So that, to the extent you were delayed in operation, to the extent the cars were lying idle, it was your fault?

A. Yes, sir.

Q. You have charged here in your statement and in your evidence that your business was interrupted because you couldn't get the cars out as fast as you could load them; and yet it is a fact, is it not, that in a majority of the instances you couldn't unload those cars because they were bunched on you?

A. In the majority of instances?

Q. Yes?

A. I couldn't testify as to that" (Rec., Vol. 2, p. 501).

253 The witness testified that the distance of his mill to a connection with the Santa Fe was approximately a mile. He made an estimate of what it would have cost to build a track from the mill to a connection with the Santa Fe. He thought it was about \$6,500 (Rec., Vol. 2, p. 514).

That the number of cars backed out by the Missouri Pacific from our mill from August, 1906, to April, 1907, was 263 cars substantially, as against 453 cars backed out during the same period of time over the Santa Fe (Rec., Vol. 2, pp. 517-518).

Special attention is called to the fact that F. C. McCord (Rec., Vol. 1, p. 154) testified that he was assistant manager of the Larabee Flour Mills Company, and had been such assistant manager for nearly three years; that he was acquainted with the mill, the track facilities, the switching service, etc., but he was not asked any question on behalf of the plaintiff as to any damage or loss sustained by the Larabee Flour Mills Company by reason of interruption of the switching service.

Also attention is called to the testimony of R. L. Cunningham (Rec., Vol. 1, p. 174).

I worked for the Larabee Company; had been working for them at Stafford about three years, or a little better. I am a loading foreman under Mr. McCord. I am acquainted with the track facilities, siding and main track, and where the mill is situated.

He testified as to no interruption of business or loss or damage or expense by reason of the interruption of the switching service.

Also the testimony of John Stevens (Rec., Vol. 1, p. 182).

254 I live at Stafford. Am in the employ of the Larabee Flour Mills Company. Have been in their employ eight years. Am superintendent and head miller. My services require me to look after the yards, loading and unloading, and outbound business. I am acquainted with the switching service performed, and have been for eight years.

The record fails to show any testimony of this witness as to any loss or damage by reason of interruption of the switching service, or any expense incurred or made necessary by reason of such interruption. The evidence of F. D. Larabee and F. S. Larabee is to the effect that all the information they had as to the details of the expense was hearsay, and taken from their books, and the books were not offered in evidence. The testimony of such witnesses was not the best evidence, and the record shows that they utterly failed to produce any witness relative — such expense and trouble growing out of the interruption of the switching service who had primary personal knowledge of any loss or damage resulting therefrom. There is no evidence in the record produced on behalf of the plaintiff in support of their claim for loss of profits in the operation of said mill, except such as is based entirely and exclusively upon speculation and guess. There is no evidence in the record to show the profits made for the preceding years, upon which to base a comparison of what the profits would have been for the period from September 1st, 1906, to April 1st, 1907.

Without going more into detail, the defendant states that 255 the testimony of F. D. Larabee and F. S. Larabee, on the question of damage to their business and loss of profits by reason of the interruption of the switching service, as shown and disclosed by the full report and record of the evidence, is based exclusively upon a speculative and conjectural estimate, without giving facts or data from which the court can reach any reasonable conclusion with reference thereto. The record discloses the fact that the final judgment of the Supreme Court of the State of Kansas was entered on the 8th day of December, 1906, and the damages claimed by the Larabee Flour Mills Company to have accrued up to that date, as claimed by their statement filed with the clerk on December 15th 1906, and as attempted to be shown by the evidence, are as follows, viz:

Expenses incurred in hauling and loading and unloading products from the mill into the Santa Fe cars.....	\$1,014.80
Loss of profit on flour business, exclusive of expenses incurred	None.
Loss of profit on account of inability to buy, grind and sell corn	None.

Amount paid Waters & Waters and J. G. Waters, account attorneys' fees	75.00
Amount paid for printing briefs in Supreme Court of Kansas	\$.....
Amount paid Vandiveer & Martin, of Hutchinson	\$25.00

256 The defendant, at the time of the introduction of the evidence relative items of damage claimed by the Larabee Company, up to and including the 8th day of December, 1906, when the judgment of the Supreme Court of the State of Kansas was entered, duly and seasonably objected to all that proving, or tending to prove, damages by reason of loss of profits on account of inability to purchase, grind and sell corn and corn products, for the reason that the same was incompetent, irrelevant and immaterial, and no proper foundation was laid for the introduction of such evidence, because the same was speculative, conjectural, and of such a character as not to be subject to judicial inquiry, and that the said claimed loss was not susceptible of reasonable ascertainment, and no proper foundation was laid to permit the introduction of such evidence—which objection was by the Commissioner overruled, to which defendant excepted, and, subject to such exception, witness was permitted to testify, as disclosed by the abstract; and duly and seasonably moved to strike out the testimony of the witness, F. D. Larabee, and the witness, F. S. Larabee, as to such item of damage, because incompetent, irrelevant and immaterial, and because the same was speculative and based upon conjecture, and the witnesses had not shown themselves competent or qualified to testify as to the same; that the same, and every part thereof, was merely calling for the opinion and conclusion of the witness, and did not prove, or attempt to prove, any fact, and was improper to be considered as an element of damage claimed herein—which motion was by the Commissioner overruled, to which defendant excepted, and such evidence, as disclosed

257 by the abstract, was permitted to remain; and duly and seasonably objected to the evidence of F. D. Larabee as to the items of expense incurred in hauling mill products to and from the mill and to and from the Santa Fe tracks, because the same was incompetent, irrelevant and immaterial and hearsay, and not the best evidence of any facts sought to be proved, because the said witness, F. D. Larabee, did not produce his books of original entry, showing the expenditure of any sum or sums on account of such expenses, and such books of original entry were the best evidence of the facts sought to be proved, and because his testimony was to the effect that he was testifying upon information furnished him by his bookkeeper, and not from any personal information or personal knowledge which he had upon the subject; all of which objections were by the Commissioner overruled, and, subject to the exception of the defendant, the witness was permitted to testify.

The defendant also at the time duly and seasonably objected to the evidence of the witnesses, F. D. Larabee and F. S. Larabee, proving, or tending to prove, any item or claimed damage on account of expenses incurred in hauling mill products from and to the said mill,

and from and to the Santa Fe track, on account of the interruption of such switching service, and for all loss of profits by reason of inability to operate the mill, or expenses incurred, of every kind, nature and description, after the 8th day of December, 1906—the date of the rendition of the final judgment herein by the
258 Supreme Court of the State of Kansas—for the following, among other reasons:

First. Because the Commissioner and the court had no right, power or jurisdiction to consider any claim for damages which accrued after the date of the rendition of said judgment, but, if authorized and empowered to render judgment for damages at all, the amount of such damage should be confined to such as had been sustained on and prior to December 8th, 1906—the date of the rendition of such judgment, and not thereafter.

Second. For the further reason that it was improper for the Commissioner and the court to consider any evidence of any damage which accrued, or was claimed to have accrued, on and after the 24th day of December, 1906, on which date the defendant was allowed a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Kansas, and executed, on said date, its bond, to operate as a supersedeas—which bond was duly approved by Hon. W. A. Johnston, Chief Justice of the Supreme Court of the State of Kansas; and from and after said date the said Supreme Court of the State of Kansas had no jurisdiction or authority to consider any question of damage which had accrued, or was claimed to have accrued, to said plaintiffs after said judgment of December 8th, 1906, had been superseded, and the record and proceedings therein transferred to the Supreme Court of the United States, in obedience to the command of the writ of error and citation of said court; which objection was by the Commissioner over-
259 ruled, and the defendant at the time duly excepted; and said witnesses, F. D. Larabee and F. S. Larabee, were permitted to testify as to items of damage which they claimed to have accrued subsequent to the rendition of said judgment of date December 8th, 1906—and especially after the 24th day of December, 1906—the date when said judgment was superseded, as aforesaid—to all which said defendant at the time duly excepted. And thereupon the defendant moved the Commissioner to strike out and not consider the evidence of F. D. Larabee and F. S. Larabee as to any claimed damage which accrued, or was claimed to have accrued, subsequent to December 24th, 1906, the date of the granting of said writ of error, and the allowance of said supersedeas, and the transfer of all the records and proceedings herein to the Supreme Court of the United States, for the reason that, as soon as such writ of error was allowed and said bond approved to operate as a supersedeas, and said record transferred to the Supreme Court of the United States, the said Supreme Court of the United States obtained exclusive jurisdiction of the proceedings so instituted in such court as aforesaid, to review and reverse the said judgment and decision of the Supreme Court of the State of Kansas, and thereafter the Supreme Court of the State of Kansas had no power, authority or jurisdiction to consider any

question of damage which may have accrued to the said plaintiffs, the Larabee Flour Mills Company, during the pendency of such proceedings in the Supreme Court of the United States, and if any damage did accrue to said plaintiffs during such period of
 260 time, for which the said plaintiffs were entitled to recover, their right to recover was based exclusively upon said supersedeas bond, and not by reason of the interruption of the switching service, for and on account of which such mandamus proceedings were instituted in this Court; and the Commissioner has no right, power or authority to consider the same, or any part thereof, and all such evidence should be excluded, and not considered by the Commissioner, which motion was by the Commissioner overruled, defendant excepting, and the said evidence tending to prove such damages, which accrued subsequent to December 24th, 1906, was permitted to remain in the record, to be considered by the Commissioner.

Abstract of the Evidence and Proceedings Relative Claimed Item of Damage on Account of Attorneys' Fees Before the Institution of Proceedings in the Supreme Court of the United States, on December 24th, 1906, to Review the Decision and Judgment of the Supreme Court of the State of Kansas of December 6th, 1906.

JOSEPH G. WATERS:

I live in Topeka. Am now and have been a practicing lawyer for several years last past. This is an action brought by the Larabee Flour Mills Company against the Missouri Pacific Railway Company to compel it, by mandamus, to resume traffic on a switch
 261 connection between its line and the Atchison, Topeka & Santa Fe, in taking cars from the Santa Fe to its mill on Missouri Pacific track and back again. The firm of Waters & Waters was engaged to commence this action. Plaintiffs hired the firm of Waters & Waters to bring this suit. There was no sum agreed upon by Waters & Waters with them. We claim we are entitled to a reasonable compensation for our services. (R., Vol. 1, p. 217.)

Defendant, the Missouri Pacific Railway Company, objects to all evidence proving, or tending to prove, the value of services rendered by Waters & Waters, as attorneys at law, in and about the institution of this proceeding, and the litigation thereafter following in the Supreme Court of the State of Kansas, for the following reasons:

First. Because the section of the Code which reads that "If judgment be given for the plaintiff, he shall recover the damage which he shall have sustained, to be ascertained by the court or jury, or by a referee, as in a civil action, and costs, etc.," as construed by the Supreme Court of Kansas, allowing the plaintiff in such action, as an element of damages, an attorney's fee, is in violation of the Constitution of the United States, in denying to the said defendant the equal protection of the law, and gives to the plaintiff in this controversy rights and privileges and protection on account of damages which are not given to the defendant under like circumstances and condition, and because of such prohibition of the Constitution

262 of the United States the said defendant is not liable in this action for any attorneys' fees paid out, or agreed to be paid out, by the said plaintiff in this controversy.

Second. Because to allow said plaintiff to recover attorneys' fees for services performed by their attorneys in a proceeding in the Supreme Court of Kansas would deny to said defendant the equal protection of the law, and give to the said plaintiff a right and privilege which, under the statutes of the State of Kansas, as construed by the Supreme Court of Kansas, is denied to the defendant in this action.

Third. Because to allow plaintiffs, in this particular action, to recover, as damages, attorneys' fees paid out, or agreed to be paid out, would be to give to the said plaintiffs an unequal and unjust advantage, because, under the decision of the Supreme Court of Kansas construing said statute, said defendant cannot, under any circumstances, recover attorneys' fees in event it should be successful in this litigation, and therefore, as construed by the said court, such ruling denies to the said defendant the equal protection of the law, and is in violation of the Constitution of the United States.

Fourth. Because said plaintiffs have made no showing that they have agreed to pay said plaintiffs' attorneys any particular sum of money, or that they have paid any particular sum of money; that the damages claimed on account of attorneys' fees are speculative, conjectural and contingent, and are not legally or properly involved in this controversy, and all evidence should be excluded proving, or tending to prove, such services, or the value thereof, as incompetent, irrelevant and immaterial.

263 Which objection was by the Commissioner overruled, to which action and ruling of the Commissioner the defendant at the time then and there duly and seasonably excepted, and the said witness was permitted to testify as to the services which he had performed in advising said plaintiffs previous to the institution of the mandamus proceedings, and to the services performed by him in the institution of such proceedings, and in the taking of evidence or preparation of briefs, and the argument before the Supreme Court of the State of Kansas. (R., Vol. 1, pp. 217-219.)

EDWARD D. MCKEEVER:

I live in Topeka. Have lived there since 1884. Am an attorney at law, engaged in general practice, and am conversant with reasonable compensation for legal services for local services. (R., Vol. 1, p. 221.)

Whereupon the witness was asked the following hypothetical question (R., Vol. 1, pp. 221-223):

"Q. I would ask you, Mr. McKeever, this question: This is an action brought by the Larabee Flour Mills Company against the Missouri Pacific Railway Company to compel it, by mandamus, to resume traffic on a switch connection between its line and that of the Atchison, Topeka & Santa Fe, in taking cars from the Santa Fe to its mill on the Missouri Pacific track, and back again. This switch

track is the only practicable method of this mill company doing business over the Sante Fe railway.

264 The firm of Waters & Waters was engaged to commence this action; no sum was agreed upon, but they are liable to Waters & Waters for a reasonable compensation for their services.

Before beginning this action, Waters & Waters had a talk with Waggener, one of defendant's attorneys, trying to settle the same without action, delaying day by day for a week, at his request, expecting to have the matter settled without suit, spending \$2.70 for telephone service in talks with him; beginning this action after it had finally declined to resume traffic over this side track; made out the affidavit for the writ, as well as the writ of alternative mandamus; appeared before the Supreme Court and had it allowed on September 16th, 1906, about, requiring defendant to answer by September 21st, 1906; upon application of defendant for further time, appeared before the Supreme Court and resisted the same; the court allowing it until September 24th, 1906, to answer; on that date it filed a plea in abatement, setting up that the Supreme Court had no jurisdiction, and that, under the Interstate Commerce acts, the Interstate Commerce Commission had the exclusive authority and jurisdiction in this controversy. We demurred to the plea, appeared before the Supreme Court, and had this plea set down for argument, which the court granted, and set the trial for October 1st, 1906; made examination of the Interstate Commerce acts, and the decisions made by the Federal Courts and the Interstate Commerce Commission; prepared and had printed a brief of twenty-one pages;

265 made oral argument on the trial; on October 5th the Supreme Court sustained the demurrer, and gave the defendant to October 10th to answer; on October 10th defendant answered, setting up all that it had set up in its plea, and other matters beside; appeared before the Supreme Court and had the case set for trial, which the court set for November 9th, and ordered the taking of testimony; are now taking the testimony before Commissioner appointed by the court. The value to the plaintiff in having the traffic restored to it will be of the value of \$15,000.00 yearly in the conduct of its business, and a loss of that amount if it shall be defeated. The case is still to be finally tried in the Supreme Court. Now, based on the foregoing statement, what is the reasonable worth of the legal services rendered in this action, from beginning to end, in the Supreme Court, based on the foregoing statement, if the plaintiff shall be successful in it?"

The defendant objected to the hypothetical question because the same was not based upon the evidence in the case, or upon any facts which had been brought before the Commissioner, and especially because it stated that the value to the plaintiff in having the traffic restored to it would be \$15,000.00 yearly in the conduct of its business, and a loss of that amount if it shall be defeated, and therefore that the said question was not a proper hypothetical question, was incompetent, irrelevant and immaterial, and for the further reason that to allow said plaintiffs to recover herein attorneys' fees as dam-

ages would be in violation of the Constitution of the United States, and deny to the said defendant in this controversy the equal protection of the law, and give to the plaintiff an unequal, unjust and undue advantage; which objection was by the Commissioner overruled, to which defendant at the time then and there duly excepted.

Witness was permitted to answer.

"A. Does that contemplate taking the case to the Supreme Court?

Q. Just that far. If we shall be successful in the Supreme Court of Kansas?

A. You say the saving to the company you represent will be \$15,000 a year?

Q. Yes, sir.

A. As long as the order is kept in force?

Q. Yes, sir, as long as the order is kept in force.

A. I think it would be worth \$2,500." (R., Vol. 1, pp. 221-223.)

I am basing my estimate upon the statement of Captain Waters that the saving to the company would be \$15,000 a year. (R., Vol. 1, p. 225.)

J. F. SWITZER:

I reside at Topeka, Kansas. Am a lawyer. Have practiced law for sixteen or seventeen years. Am acquainted with the reasonable value of legal services in this locality.

The hypothetical question hereinbefore copied and presented to Edward D. McKeever was here repeated to the witness. (R., Vol. 1, pp. 228-230.)

267 The defendant interposed the same objection as before, which objection was by the court overruled, to which defendant excepted. Witness was permitted to answer.

"A. Oh, I would say \$2,000 or \$2,500." (R., Vol. 1, p. 230.)

J. J. SCHENCK:

I reside at Topeka. (R., Vol. 1, p. 234.) Am a lawyer, and have practiced law seventeen years. Am acquainted with the reasonable compensation which should be allowed attorneys for legal services. (R., Vol. 1, p. 234.)

The same question which was asked Edward D. McKeever was here repeated to the witness. (R., Vol. 1, pp. 234-235.) Defendant thereupon interposed the same objection to this question as to the one propounded the said E. D. McKeever, which objection was overruled, defendant excepting.

"A. My judgment would be that \$2,500 would be a minimum." (R., Vol. 1, p. 235.)

A. B. QUINTON:

I reside at Topeka. Am a lawyer, and have been for about thirty years. Am acquainted with reasonable value and reasonable compensation for local services in this locality. (R., Vol. 1, p. 338.)

Hypothetical question substantially in the form as that
268 presented to E. D. McKeever was here repeated and pro-
pounded to the witness (R., Vol. 1, pp. 239-245), to which
the same objection was interposed as before by the defendant, which
was overruled by the Commissioner, defendant excepting, and wit-
ness answered:

"A. Well, I should think \$2,500 would be a fair fee.

Q. And what if the case should be finally carried to and tried in
the Federal Court of Appeals, or in the Supreme Court of the United
States, and successful there? I mean what further fee, in addition
to the foregoing amount?

A. Probably \$1,000." (R., Vol. 1, p. 245.)

I do not think a lawyer who would advise a client to go into a
controversy which would possibly entail a loss of \$15,000 a year,
when the controversy could be settled for \$79, would be entitled to
any such compensation as I have before indicated. (R., Vol. 1, p.
248.)

The defendant here moves the Commissioner to strike out all
evidence of the said E. D. McKeever, J. F. Switzer, J. J. Schenck
and A. B. Quinton of and concerning the value of attorneys' fees
of Waters & Waters in and about the institution of the said man-
damus proceedings in the Supreme Court of Kansas, and in the
prosecution thereof, for the following reasons, to-wit:

First. Because the same is irrelevant, incompetent and immaterial.

269 Second. Because the said plaintiffs have not shown any
contract or agreement under and by virtue of which they had
become responsible for any attorneys' fees relative subject
matter of such litigation.

Third. Because to allow the said plaintiffs to recover, as an item
of damage, attorneys' fees in this proceeding, on account of serv-
ices of their attorneys in the Supreme Court of Kansas, would be to
deny to the said defendant the equal protection of the law and give
and accord to the said plaintiffs an unjust, undue and unequal ad-
vantage, and establish an unlawful discrimination in favor of the
plaintiffs in the prosecution of a private right, when such privilege
was not accorded to the said defendant, in the event they should
recover in said action.

Fourth. Because the hypothetical question upon which the said
evidence of said witnesses was given is not a correct statement of the
facts sustained by any evidence in the record, and is a false assump-
tion of facts which do not exist, and upon which no evidence has
been introduced showing, or tending to show, the same; which
motion was by the Commissioner overruled, to which defendant at
the time duly excepted.

270 *Abstract of Evidence and Proceedings Relative Claimed Item of Damage on Account of Attorneys' Fees for Services of Plaintiffs' Attorneys Rendered While Such Proceedings Were Pending in the Supreme Court of the United States, on a Writ of Error from the Supreme Court of the United States to the Supreme Court of Kansas.*

F. S. LARABEE:

We employed the firm of Rossington & Smith to assist Waters & Waters, for a minimum of \$500. (R., Vol. 2, p. 396.)

"Q. In the event the Missouri Pacific should not pay the attorneys' fees, would you feel yourself obligated to the firm of Rossington & Smith in the sum of \$30,000?

A. I could not answer that offhand.

Q. You are not willing to go upon record to that effect?

A. No, I do not think so.

Q. If the court should eventually determine there was no obligation on the part of the Missouri Pacific for these attorneys' fees, to what extent would you feel obligated to Rossington & Smith?

A. I cannot answer that." (R., Vol. 2, p. 387.)

F. D. LARABEE:

My brother and I employed the firm of Waters & Waters, 271 and were to pay them a reasonable fee—whatever was right and correct. (R., Vol. 2, p. 474.)

"Q. After the termination of the suit in the Supreme Court, did they render you a bill?

A. I don't think so.

Q. Did you pay them anything?

A. I think we have.

Q. How much?

A. I couldn't tell you without the record." (R., Vol. 2, p. 475.)

"Q. Now, Mr. Larabee, you have claimed here a large sum of money as attorneys' fee, upon the ground those attorneys' fees are reasonable. Will you state that it is your intention, and that you feel under obligation, to pay whatever is a reasonable attorneys' fee in all this litigation, regardless of and independent of the fact that you may recover it from the Missouri Pacific?

A. I hadn't gotten that far. I hadn't formed any opinion about that." (R., Vol. 2, p. 476.)

"Q. Do you feel, in view of the fact that you have claimed this large amount of damage here, that you are under legal obligations to pay these gentlemen whatever may be a reasonable fee, or they may establish as a reasonable fee, whether you recover it from the Missouri Pacific or not?

A. I hadn't gotten that far along in my feelings. I hadn't thought about it." (R., Vol. 2, p. 477.)

I employed the firm of Rossington & Smith myself. My brother was present.

"Q. Have they submitted any bill to you?

A. I don't know. (R., Vol. 2, p. 478.)

Q. Have Waters & Waters submitted any bills?

A. I couldn't tell you.

272 Q. You haven't seen any bills that either of these gentlemen presented?

A. No, sir.

Q. You don't know whether they presented a bill or not?

A. I don't know whether they framed up a bill then. I know by the proceedings here how much they are charging here. Whether they have sent a bill in at all or not I don't know." (R., Vol. 2, p. 478.)

Mr. Switzer was employed at the time Rossington & Smith were employed. He was employed by Mr. Waters.

"Q. Do you know whether he ever appeared in the case or not?

A. I don't think he ever appeared in the court.

Q. Did you ever consult with him?

A. No, sir.

Q. On the case?

A. No, sir." (R., Vol. 2, p. 479.)

"Q. Ever have any conversation with him about the case?

A. Nothing, only informally. I met him on the street once or twice.

Q. Have you ever had any conversation since the case was decided?

A. I may have.

Q. About the case?

A. Yes, but it is only street talk.

Q. You never had any consultation with him about the case before it was tried?

A. No, sir." (R., Vol. 2, p. 480.)

Our first agreement was with Mr. Waters, over the 'phone, when I agreed to pay him \$75 to come down and advise us. (R., Vol. 2, p. 600.) I think at some later time he told me that, in case

273 of winning a suit of this kind, the defendant party was to pay the attorneys' fees. (R., Vol. 2, p. 601.)

"Q. Have you employed Mr. Joseph Houston in this case?

A. No, I didn't employ him.

Q. And he does not represent you by virtue of any employment you made?

A. Not personally that I made." (R., Vol. 2, p. 663.)

"Q. Now, Mr. Larabee, have you any book account with Rossington & Smith, or Waters & Waters, or Switzer?

A. No, sir.

Q. Have you ever charged them with any amount you have paid them on any account?

A. Do you mean a ledger account of it?

Q. Yes.

A. No." (R., Vol. 3, p. 1442.)

I am not sure when the last payment was made to Rossington &

Smith, but possibly it was in April—the 23d of April, 1907. (R., Vol. 3, p. 1443.)

“Q. Now, I will ask you if, at any time, by letter or otherwise, Rossington & Smith, or either of them, have presented to you any bill or claim for additional compensation?

A. I don't think I have ever had any bill from Rossington & Smith.

Q. Have you in the schedule of your liabilities on your books, scheduled any liability to Rossington & Smith?

A. No, sir.

Q. You make financial statements to the commercial agency sometimes, don't you?

A. Yes.

Q. Have you ever included in such statement a liability to Rossington & Smith

A. No. (R., Vol. 3, p. 1444.)

Q. Now, then, take the account with Waters & Waters.
274 Give the first item, and each item consecutively, dates and amount?

A. Well, I think there is some paid I haven't got here. There was on December 14—that is in 1907—well, that might be in 1906—\$75. Then there was April 10, \$125.

Q. What year?

A. That is 1908, and April 20, 1908, \$50; May 7, \$100.

Q. May 7, 1908?

A. Yes. December 28, 1908, \$15. December 31, \$500.

Q. December 31, 1908?

A. That is 1908. Now, here is some back in 1907: May 1, 1907, \$115; October 13, 1906, \$250; and September 5, 1906, \$75. That other \$75 item was in here. That was in 1907—December 14, 1907—that first \$75 item was.

Q. Have you the checks for all these payments?

A. No, I haven't, Mr. Waggener. I found all we could. We hunted both vaults over.

Q. Have you any ledger account with Waters & Waters?

A. No.

Q. What you have stated, then, represents money you have paid to them?

A. Yes. (R., Vol. 3, p. 1445.)

Q. Have Waters & Waters, or either of them, by letter or otherwise, ever presented a bill against you for any other additional compensation than that which you have paid?

A. No.

Q. Have you on your books any statement showing a liability, or, among your liabilities, a claim or demand of Waters & Waters?

A. No.

Q. Of any kind, nature or description?

A. None.

275 Q. Have you ever paid anything to John F. Switzer?

A. I think not. Our bargain was made with him through Mr. Waters, as I recollect it.

Q. Has he ever presented any bill against you?

A. No.

Q. Has he ever made any demand on you?

A. No." (R., Vol. 3, p. 1446.)

"Q. Then, as I understand you to state, neither one of these gentlemen, during all the years of this litigation, have presented any claim or made any demand upon you, other than what you have indicated has been made?

A. Well, if I have them all there, I have paid the bills, and their requests for remittances as they sent them in; if I have them all there, that is what we paid them.

Q. Do you remember the time Colonel Rossington died?

A. No.

Q. The last draft you sent them, as I understand your statement, was April 22, 1908, for \$250? Is that correct?

A. I think that is correct." (R., Vol. 3, p. 1447.)

J. G. Waters.

Examined by Mr. HOUSTON:

My firm was originally employed by the Larabee Flour Mills Company, and afterwards John F. Switzer, of Topeka, and Rossington & Smith, also of this city, came in (R., Vol. 2, p. 617). My first agreement was that I was to have \$75 (R., Vol. 2, p. 618).

Witness here gives a detailed statement of what was done
276 by him in the institution and prosecution of the mandamus suit. (R., Vol. 2, pp. 618-625.)

"Q. Now, Colonel, if you know, you may state what value or benefit the success of your client was to him.

(Objected to as calling for the opinion of the witness, incompetent, irrelevant and immaterial, and no proper foundation laid for the question. Overruled, defendant excepting.)

A. I can only give, as a lawyer fairly familiar with the law, and the situation down there, my opinion of the extent of that opinion."

(This refers to the opinion of the Supreme Court of Kansas reported in 74 Kansas, p. 808.)

"Q. If the result of that opinion has saved your client anything, you may state what, if you know?

A. It has saved my client the cost of court.

Q. Amounting to how much, about?

A. I should say three or four or five hundred dollars. I should say six hundred dollars." (R., Vol. 2, p. 626.)

If my client had lost he would have had to suffer the loss sustained by the stoppage of that transfer track, and it would have been a permanent loss from year to year, according to the business done, as long as his business existed, or he made his peace with the Missouri Pacific road.

(Defendant moves to strike out this evidence of the witness as

calling for his opinion, and no proper foundation laid for such evidence—incompetent, irrelevant and immaterial. Objection overruled, defendant excepting.)

277 “Q. From your acquaintance with this case, and the facts in connection with it, and your acquaintance with the saving that has been sustained, state, if you will, what that would be?

A. I can only judge that from the testimony taken in this case.

Q. If you have, from the books and the testimony, and any other sources whatever, secured personal knowledge yourself of the extent of the saving, please state what that was?”

(Objected to as incompetent, irrelevant and immaterial; not based upon any of the facts sought to be proved; calling for the opinion of the witness, and no proper foundation laid for the question. Overruled, defendant excepting.)

A. I would say this, Mr. Houston: That, until His Honor, the Commissioner, decided the exact amount, I could not say; but, from all the information I have got, that if he had been defeated in this controversy, it would have been at least the sum of \$24,000 for the stoppage of this mill. That mill burned down afterwards, and, by an agreement between Mr. Waggener and ourselves, this case was to run on into these courts without any suggestions of the mill being burned down, and I think it is fair to state on both sides that the Supreme Court don't know to this day that mill was ever burned down—the Supreme Court of the United States.

Mr. WAGGENER: Don't you think you have our agreement wrong? Wasn't our agreement made along in March, because your people wanted the service, and the service was restored April 1st, with the understanding that the restoration of it would not be referred
278 to up there, and the mill burned down in July?

A. Yes, sir; that is right. From my knowledge of the case the damage in sight that he would have suffered would be the sum of \$24,000, and, if there is to be any correction of it, it can only be made absolutely certain by the findings of the Commissioner in this case upon the testimony.”

(Defendant here moves to strike out the last answer of the witness as incompetent, irrelevant and immaterial. Objection overruled, defendant excepting.) (R., Vol. 2, p. 628.)

Witness here identified Exhibit “Y” as the transcript of record made by the Missouri Pacific Railway Company, plaintiff in error, against the Larabee Flour Mills Company, filed in the Supreme Court of the United States, and offered the same in evidence. And also offered in evidence Exhibits “A,” “B,” “C,” “D,” “E,” “F,” “G,” “H,” and “Y.” (R., Vol. 2, p. 645.)

(The defendant, the Missouri Pacific Railway Company, objects to the introduction in evidence of Exhibits “A” to “H,” inclusive, and “Y,” and moves to strike out all of the testimony of the witness, J. G. Waters, as to the services by him performed in the litigation

in the Supreme Court of the State of Kansas and in the Supreme Court of the United States, for the following reasons:

First. Because the section of the Code which reads: "If judgment be given for the plaintiff, he shall recover the damages which he shall have sustained, to be ascertained by the court or jury or by referee, as in a civil action," and costs, etc., as construed by the Supreme Court of the State of Kansas, allowing the plaintiff in

279 such an action, as an element of damages, an attorney's fee, is in violation of the Constitution of the United States, in denying the said defendant the equal protection of the law, and gives to a plaintiff in such controversy rights and privileges and protection on account of damages that are not given to the defendant under like circumstances and conditions, and, because of such prohibition of the Constitution of the United States, the said defendant is not liable in this action for any attorney's fees paid out, or agreed to be paid out, by the said plaintiff in this controversy.

Second. Because, according to the rules and practice of the Federal Court, and especially of the Supreme Court of the United States, as decided by that court, attorney's fees cannot be recovered in any action on account of damage in any suit pending in such court, and to allow such attorney's fees for services rendered in the Supreme Court of the United States would be in violation of the established rules of that court, and the decision thereof, and in violation of the Constitution of the United States, as a denial to the said defendant of the equal protection of the law.

Third. Because the said plaintiffs, if they have any remedy whatever, on account of such damage, should be based upon the supersedeas bond which has been given, and which takes the place of all claims for damages under and by virtue of said provision of the Code, to which reference is hereinbefore made.

Fourth. Because to allow the said plaintiff to recover attorney's fees for services performed, either in the Supreme Court of the State of Kansas or of the Supreme Court of the United States, in this action would deny to the said defendant the equal protection of the law, and give to the said plaintiff a right, privilege and remedy which, under the statutes of the State of Kansas, as construed by the Supreme Court of the State of Kansas, is denied to the defendant in such action.

Fifth. Because in this particular action to allow the plaintiff to recover, as damages, attorney's fees paid out, or agreed to be paid out, would be to give to the said plaintiff an unequal and unjust advantage, because, under the decisions of the Supreme Court of the State of Kansas construing said statute, the said defendant cannot, under any circumstances, recover attorney's fees in the event it should have been successful in this litigation, and, therefore, as construed by said court, such rules deny to the said defendant the equal protection of the law, and is in violation of the Constitution of the United States.

Sixth. Because the said plaintiffs have made no showing that they have agreed to pay the said plaintiffs' attorneys any particular sum of money, or that they have paid any particular sum of money, and

that the damages claimed on account of attorneys' fees are speculative conjectural and contingent, and are not legally or properly involved in this controversy, and all evidence should be excluded proving, or tending to prove, such services, or the value thereof, as incompetent, irrelevant and immaterial.) (R., Vol. 2, pp. 645-647.)

281 "Q. What, in your opinion, is the reasonable value of the services of Mr. Switzer for the work he did in this case, as known by you—such work as known by you?"

The defendant, the Missouri Pacific Railway Company, objects to the question as to the services performed in the litigation in the Supreme Court of the State of Kansas and in the Supreme Court of the United States, for the following reasons:

First. Because the section of the Code which reads: "If judgment be given for the plaintiff, he shall recover the damages which he shall have sustained, to be ascertained by the court or jury or by referee, as in a civil action," and costs, etc., as construed by the Supreme Court of the State of Kansas, allowing the plaintiff in such an action, as an element of damages, an attorney's fee, is in violation of the Constitution of the United States, in denying the said defendant the equal protection of the law, and gives to a plaintiff in such controversy rights and privileges and protection on account of damages that are not given to the defendant under like circumstances and conditions, and, because of such prohibition of the Constitution of the United States, the said defendant is not liable in this action for any attorney's fees paid out, or agreed to be paid out, by the said plaintiff in this controversy.

282 Second. Because, according to the rules and practice of the Federal Court, and especially of the Supreme Court of the United States, as decided by that court, attorney's fees cannot be recovered in any action on account of damages in any suit pending in such court, and to allow such attorney's fees for services rendered in the Supreme Court of the United States would be in violation of the established rules of that court, and the decision thereof, and in violation of the Constitution of the United States, as a denial to the said defendant of the equal protection of the law.

Third. Because the said plaintiffs, if they have any remedy whatever, on account of such damage, should be based upon the supersedeas bond which has been given, and which takes the place of all claims for damages under and by virtue of said provision of the Code to which reference is hereinbefore made.

Fourth. Because to allow the said plaintiff to recover attorney's fees for services performed, either in the Supreme Court of the State of Kansas or of the Supreme Court of the United States, in this action would deny to the said defendant the equal protection of the law, and give to the said plaintiff a right, privilege and remedy which, under the statutes of the State of Kansas, as construed by the Supreme Court of the State of Kansas, is denied to the defendant in such action.

Fifth. Because in this particular action to allow the plaintiff to recover, as damages, attorney's fees paid out, or agreed to be paid out,

would be to give to the said plaintiff an unequal and unjust advantage, because, under the decision of the Supreme Court of the State of Kansas construing said statute, the said defendant cannot, under any circumstances, recover attorney's fees in the event it should have been successful in this litigation, and, therefore, as construed by said court, such rules deny to the said defendant the equal protection of the law, and is in violation of the Constitution of the United States.

Sixth. Because the said plaintiffs have made no showing that they have agreed to pay the said plaintiffs' attorneys any particular sum of money, or that they have paid any particular sum of money, and that the damages claimed on account of attorney's fees are speculative, conjectural and contingent, and are not legally or properly involved in this controversy, and all evidence should be excluded proving, or tending to prove, such services, or the value thereof, as incompetent, irrelevant and immaterial.

"A. From my knowledge of what he did personally, the character of the controversy, and the court it was in, it was worth fully \$5,000." (R., Vol. 2, p. 651.)

"Q. State what, in your opinion, the services of Rossington & Smith was worth—the reasonable worth of them—based upon the facts as narrated by you in your testimony just given?"

(Defendant here interposed the same objection as hereinbefore interposed to the question propounded to the witness Waters as to the value of the services of John F. Switzer (R., Vol. 2, p. 652), which was by the Commissioner overruled, defendant excepting, and witness answered:)

"A. I will state the full amount claimed by them, \$30,000, upon the statements I have made in my testimony of what they did.

Q. You may state what, in your opinion, is the reasonable value of the services performed by you in this case, upon the facts as narrated by you in the testimony which you have just given?

A. Mr. Houston, I would rather lose it than testify to it. Somebody else has got to do that." (R., Vol. 2, p. 654.)

(It will here be observed that this witness was too modest to testify as to the value of his own services, but his modesty did not keep him from placing the value of the services of Rossington & Smith, for preparation of a brief of not exceeding fifty pages, and a fifteen minutes' argument in the Supreme Court of the United States, at \$30,000.)

"Q. You prefer not to do that? (R., Vol. 2, p. 654.)

A. I won't do it, and I never have done it. What I have said about Mr. Switzer in no way has anything to do with my fees in this case."

Cross-examination by B. P. WAGGENER of J. G. WATERS:

It didn't require any previous study to prepare application for mandamus. It took me probably half an hour to prepare it (R.,

Vol. 2, p. 661). At that time I understood the controversy involved \$79 as demurrage charges, and did not require much investigation. I advised Mr. Larabee not to pay the \$79, and he acted upon my advice. That was the beginning of this controversy (R., Vol. 2, p. 662). I had two or three conversations with you (B. P. Waggener) over the 'phone, which probably consumed five minutes at a time. I prepared briefs on demurrer to plea in abatement, which took a very short time (R., Vol. 2, p. 663). I can't say whether I was at work one day or ten days in the preparation of the brief on 285 demurrer to plea in abatement. The argument in the Supreme Court of Kansas took twenty minutes, and the court summarily disposed of it (R., Vol. 2, p. 664). I next applied and had a Commissioner appointed. I spent two or three days at Stafford. I charged \$75 for a trip down there to prepare the case, and think that was a reasonable charge (R., Vol. 2, p. 665). I was engaged approximately three days in the taking of evidence before the Commissioner—maybe more. I think one hundred dollars would be an ordinary fee for that three days (R., Vol. 2, p. 666). I have no book account of the charge against the Larabee Company for my services. I never keep any books. I spent a day or so in Topeka taking evidence before the Commissioner (R., Vol. 2, p. 667).

"Q. About how long were you engaged in the preparation of the brief?

A. It was some time I devoted to it.

Q. The report of the referee was in now, and the case was heard very shortly, was it not?

A. Yes—well, it was, you might say, in the interim from the time the report came in until I filed it.

Q. Assuming that was ten days, were you continuously engaged in it?

A. No, I don't think a man could be." (R., Vol. 2, p. 668).

The argument before the Supreme Court probably did not take more than thirty minutes. No one else appeared there with me. (R., Vol. 2, p. 669.)

"Q. What, in your opinion, would you ordinarily charge for the preparation of the case and argument in the Supreme Court?

A. I have an idea that if I would cover the ground, the 286 brief you furnished, and to make a twenty-minute talk in the Supreme Court, if I got fifty or a hundred dollars for it I would be making a fair charge." (R., Vol. 2, p. 670.)

I never presented a bill to the Larabees for my services. Mr. Switzer was employed after the decision of the Supreme Court of Kansas (R., Vol. 2, p. 673). I think Mr. Switzer was engaged about ten days all together in the preparation of brief, for which I think his services are worth \$5,000 (R., Vol. 2, p. 676).

"Q. Let me ask you, suppose that it turns out that the Missouri Pacific is not liable in this case for attorney's fees, will you say, under oath, that you intend to present a bill and make Mr. Larabee pay you \$40,000? (R., Vol. 2, p. 678).

A. Now, Mr. Waggener, I have been employed in this case to look up the law. I find out that where a person compels another to

do a duty enjoined by law that he can have not only the process issued; he can get a judgment for costs, and the Supreme Court says he may have his damages, and the Supreme Court, in construing that, said that in the question of damages included an attorney's fee that may be collected in the same case. If I had been unsuccessful, there would have been mighty little of benefit that I could or would have rendered to my clients. He would have to suffer the injury to his mill. He would have to pay the costs, and I would have been no possible good to him, and there was just two questions: If he failed, I could be of no good to him. If he was successful, the question of the possibility of the Missouri Pacific not paying him, I say, was not a term in this equation.

287 Q. Will you say, under oath, and on your honor as a man, that, if it is ultimately decided that the Missouri Pacific is not liable for these fees for any reason, that you expect to make the Larabees pay you what you have said was the reasonable fee charged here? (R., Vol. 2, p. 679.)

A. I intend to charge the Larabees a reasonable amount, equivalent to my services. They expect to pay it. And they have been informed by me that they can recoup from the railroad the money they pay, but I have been paid everything that I have requested. I suppose any moderate amounts they would give me more—I haven't asked him—but I expect they will pay whatever a reasonable compensation is allowed here, and, if I am allowed the full \$40,000 against them, which cuts no figure, I suppose, I have got the right to charge it, and they are compelled to pay it; but in the finality of this thing, I would do just exactly as you do. If I found out that they are not responsible, I have got my volition, which I would exercise.

Q. And that is?

A. That is to reduce the fee to a sum that they could afford to pay for the miserable service that I have rendered them.

Q. I asked you, do you state under oath that, in the event it is decided by the court that the Missouri Pacific Railway Company is not liable for attorney's fee as damages, that you intend to present any such bill against them as you present against the Missouri Pacific?

A. That is a question of moral—that is a question addressed to my manhood, instead of my legal rights—and I think I would be—

288 Q. (Interrupting.) I asked you if it is your purpose and intention to present your bill against them upon the basis you present it against the Missouri Pacific? (R., Vol. 2, p. 680.)

A. I do. I presented it in good faith. They have agreed to pay it in good faith, and upon the theory that I am entitled to it; that they have agreed to pay it, and the law says they can recoup from the Missouri Pacific.

Q. Have they agreed to pay it upon the theory only that you can recover it from the Missouri Pacific, or they can?

A. I don't know. They have understood that the Missouri Pacific is liable for it.

Q. And has your arrangement with them and understanding and agreement been based upon the theory that the compensation for attorneys shall be or will be recovered from the Missouri Pacific?

A. There has been no agreement between Mr. Larabee and me, for myself or Mr. Switzer, that there should be any scaling down in the future.

Q. But haven't you advised them that it could be recovered from the Missouri Pacific?

A. Yes, sir, I think so, and I advise them again.

Q. What I am getting at is this: Are you prosecuting this case for this item of damage upon the sole theory that the damages are to be recovered from the Missouri Pacific, and not from the Larabees?

A. My claim is against the Larabees. The Larabees expect to pay it.

Q. Do they expect to pay you forty thousand?

A. I think they do, because I think they are going to get it from the Missouri Pacific.

Q. But if they don't get it from the Missouri Pacific, do
289 you expect them to pay it? (R., Vol. 2, p. 681.)

A. I say, how could I? You wouldn't ask it, Mr. Waggener.

Q. Is this item of attorney's fees presented solely upon the theory that it will be recovered from the Missouri Pacific?

A. I say no. I say back of everything was the agreement of him to pay me a reasonable attorney's fee, which he consented to do, and whatever that reasonable fee is, it may be conjectural—but it finally comes to what the Commissioner says shall be the fee—that, you bet, will be paid.

Q. Suppose the Commissioner should find upon the evidence that your fee was forty thousand dollars, but that the court should ultimately decide that the Missouri Pacific was not liable for an attorney's fee as an item of damage, do you expect the Larabees to pay that forty thousand?

A. You need't suggest it, on your honor, if I found out that the court had allowed me fifteen or twenty thousand dollars for a fee, and upon the supposition that was my services, and that I found out you had raised the question it was taking property without compensation, and against the Fourteenth Amendment, and they couldn't recover from the Missouri Pacific, it would be a direct appeal to my manhood, and not a question of law whether I would take it or not—and I wouldn't take it.

Q. Now, then, the Larabees are not damaged, except in that respect—the extent of the attorney's fees they paid or are legally bound to pay?

290 A. Yes, that is all. That is, so far as the question of attorney's fees is concerned." (R., Vol. 2, p. 682.)

“Q. And you are prosecuting this claim for damages for attorney's fees upon the theory that you can get it out of the Missouri Pacific, as a speculative proposition?

A. Mr. Waggener, I am prosecuting this case, and have given them the best of my meager ability and time, because they employed

me as a lawyer, and as an adjunct to it every dollar I get I would be pleased to accept as an attorney.

Q. Suppose the law did not provide that the defendants in the case of this kind should pay attorney's fees, and you had been employed just as you have been employed in this case, and had accomplished just the same results you have accomplished—had argued the same great questions you say you have argued, and been as successful as you have—would you present any such bill against the Larabees?

A. I would simply say, Mr. Waggener, I wouldn't have gone that far in the controversy if there was no help for a man injured, that had been injured by a railroad, and shut off, and I found out all expenses of a prosecution was on him, and he could not recoup from the railroad company—it would be unwise to take this action at all.

Q. You are prosecuting this case upon a contingent fee?

A. No, sir; I am not. I am basing the fee upon what would be a reasonable one, and the success obtained.

Q. You have said in so many words that you don't expect
291 them to pay that reasonable fee unless they can recoup from the Missouri Pacific? (R., Vol. 2, p. 683.)

A. I simply stated that it was their expectation to recoup from the Missouri Pacific, and pay me a reasonable fee.

Q. If they can?

A. They will do it. They may not be certain of any amount, but where they have had to compel a man to do his duty, and where the Supreme Court has already rendered a judgment for damages in which they say it includes attorney's fee, it strikes me your questions are inapt. I don't believe there is any controversy about this attorney's fee.

Q. What proportion of this claim of \$40,000 do you make for the services rendered in the Supreme Court of the United States?

A. All of it. That has no reference whatever to my services in the Supreme Court of the State of Kansas.

Q. That hypothetical question?

A. That is additional.

Q. So that applies to the compensation you think you are entitled to for services rendered in the Supreme Court of the United States?

A. Yes, sir; exactly.

Q. I notice the concluding part of this: 'And what is a reasonable fee in its entirety for the fee of all these attorneys,' as the concluding part on page 15, you haven't answered that?

A. Mr. Waggener, I hadn't answered as to my own fee, and I don't want to." (R., Vol. 2, p. 684.)

292 "Q. As I understood you to say yesterday, these payments were made based upon an expression of opinion by you to them that unquestionably all of this money would be recouped and paid back by the Missouri Pacific? (R., Vol. 2, p. 710.)

A. I cannot say that, but I can say that I told them when we got a judgment in the Supreme Court, and had told them all along through the suit that if we were successful they would recoup from the Missouri Pacific the amount they agreed to pay us as attorneys.

Q. I understood you to say that these payments were made with the understanding it would be recouped from the Missouri Pacific?

A. I would say that is the understanding we gathered, and they certainly must have had it.

Q. Who employed Mr. J. G. Houston in this case?

A. I did.

Q. Because he lived at Wichita?

A. No, sir. I employed him because we had interviewed him in relation to a witness, and we had found out his standing, as a lawyer, in matters of that kind, and the most able man we could get. We wrote him a letter, and we first interviewed him as a witness, and wrote him a letter that it would be a little uncouth of us to present our own case here—what we were so intimately connected with—and we hired him ourselves—Mr. Smith, Mr. Switzer and myself.

Q. He is not employed in this case by the Larabees?

A. He is not, but with their consent.

Q. He was employed by you because you considered this your case?

A. No, sir; we employed him just exactly as any professional attorney would be. He couldn't act as witness and attorney. They don't do it in the profession. (R., Vol. 2, p. 711.)

Q. He was employed by you, after consultation with Mr. Switzer and Mr. Smith, to represent you gentlemen?

A. Yes, sir.

Q. And you expect to pay him?

A. We expect to pay him. I agreed to pay him, and I can tell you the amount if you want to know.

Q. All right.

(Objected to.)

Q. The purpose of this examination is, and you have admitted it, that you, Switzer and Smith employed him in this case?

A. We employed him—yes, sir—under our idea, we couldn't possibly, where it was a question of our fees—we could hardly go upon the stand as witnesses, and be represented in court. He, of all the lawyers we had spoken to in Kansas, was more capable of presenting this case for us." (R., Vol. 2, p. 712.)

"Q. Mr. Houston was employed because of your interest in this case, and that of Mr. Switzer and Mr. Smith?

A. Yes, sir—wholly and solely. (R., Vol. 2, p. 784.)

Q. Was his fee to be contingent?

A. It was not. We agreed to give him—I wrote the letter, and agreed to give him a certain amount of our fees.

Q. Of whatever you recovered in this case?

A. Yes, sir.

Q. In this investigation before the Commissioner, Mr. Houston represents you and Mr. Switzer and Mr. Smith, and for such services he is to receive a certain amount of the fees which you recover?

A. Which the plaintiff recovers, and which we expect to get. There is one thing that I want to add to my testimony.

By Mr. Houston: Did you mean to state I am representing you on a condition?

A. No, sir. The only thing was, you was to represent the plaintiff in this case, and for no purpose but upon this branch of it, and your fees was to come out of what might be awarded, if anything, to Mr. Switzer and myself and Mr. Smith—but making no additional charge to the plaintiff; but he was to represent the plaintiff.

Q. I was wondering if Mr. Houston might not employ somebody hereafter to represent him.

A. Mr. Waggener, the whole thing is just this: The Kaw River that first bores through the dam, and inundates a valley and destroys an entire city, is responsible for the entire damage.

Q. Mr. Houston lives at Wichita?

A. Yes, sir.

Q. And is a practicing lawyer there?

A. Yes, sir, and has been for a number of years.

Q. How many lawyers in Topeka?

A. About 120.

Q. How many in the building where your office is?

A. I would say thirty or forty.

Q. All prominent lawyers?

A. I say no.

Q. The majority of them?

A. No, sir. If you come down, here is Mr. Schenck, that is county attorney, that is a particular friend of mine, and is a first-class lawyer, but he couldn't have anything to do with it because he is engaged.

295 Q. Have you applied to him to represent you in this case?

A. No, sir; I didn't want him. He didn't have time.

Q. Have you applied to any lawyer in the city of Topeka?

A. No, sir. I am acquainted with every lawyer here.

Q. Mr. Houston was not employed because of the fact that he resides at Wichita?

A. Mr. Switzer is a warm friend of his. Of course, ever since he has been here, and in discussing here, he says it is improper to make suggestions as an attorney, and be a witness in these cases.

Q. And, notwithstanding that, you do not now propose to retire from the case as a lawyer?

A. I want to argue in a small way every feature of this case, except the value of our fees." (R., Vol. 2, p. 786.)

"Q. You propose, as a lawyer, to continue on in the case to represent the plaintiff as well as yourself?

A. Yes, and I shall do my level best to get all the help I can from Mr. Houston.

By Mr. Houston:

Q. The fact of the matter is that you gentlemen, after talking together, didn't feel like examining each other, and making a presentation of your own fees, and examining witness on the amount of them?

A. Yes, sir.

Q. You wanted me to do that for you?

A. Yes, sir.

Q. That is all my connection with the case here?

296 A. Yes, sir, and I can add further, we had come to the conclusion if we couldn't get Mr. Houston we would get Dumont Smith, who was the next man that suited our idea of what this case was.

By Mr. WAGGENER:

Q. You didn't think there was any lawyer in Topeka that was as competent as he was on that subject?

A. No, sir; there wasn't a good, first-class lawyer here. There are a large number of lawyers in their own business—Lee Monroe is a first-class lawyer, but he is in his office business most of the time. You have got a large acquaintance in this city yourself, and the cross-examiners in the profession are few, and that is what you need in this case when you produce your testimony." (R., Vol. 2, p. 787.)

"Q. Then, as I understand, it was because of the special ability of Mr. Houston as cross-examiner?

A. Yes, and so acquainted with what the facts have been, the incidents of the case—interstate commerce law.

Q. You feel you are capable—you and Mr. Charles Blood Smith—to cross-examine all witnesses the defendant might introduce, are you not?

Mr. HOUSTON: We object on behalf of the attorneys for Mr. Larabee, and on behalf of ourselves, on the ground that it is immaterial and irrelevant. It is insulting the court and the lawyers engaged in the case, and is not in accordance with the courtesies that should prevail in this kind of a matter." (R., Vol. 2, p. 788.)

297 The defendant here moves the Commissioner to strike out all the evidence of the witness, J. G. Waters, relative to professional services, and fee therefor, and services in the United States Supreme Court, for the following reasons:

First. It appears from the record and transcript already introduced that the judgment and decision of the Supreme Court of Kansas was rendered on the 8th day of December, 1906, and that, on the 24th day of December, 1906, a writ of error was issued from and out of the Supreme Court of the United States to the Supreme Court of the State of Kansas, on proceedings instituted to review the judgment and decision of the Supreme Court of Kansas, and that a supersedeas bond was given, and allowed, to operate as a supersedeas in pursuance of Section 1000, Statutes of the United States, 1901, which provides that:

"Every justice or judge signing a citation on any writ of error shall, in cases brought up by the United States or by direction of any department of the government, take good and sufficient security that the plaintiff in error or the appellant shall prosecute his writ of appeal to effect, and, if he fail to make his plea good, shall answer all damages and costs, where the writ is a supersedeas, and stays execution, or all costs only where it is not a supersedeas as aforesaid."

And by Section 1003, it is provided that:

298 "Writs of error from the Supreme Court to a state court, in cases authorized by law, shall be issued in the same manner, and under the same regulations, and shall have the same effect, as if the judgment or decree complained of had been rendered or passed in a court of the United States."

And by Section 1010, it is provided that:

"Where, upon a writ of error, judgment is affirmed in the Supreme Court or a circuit court, the court shall adjudge to the respondent in error just damages for his delay, and single or double costs, at its discretion."

And the Supreme Court of Kansas has no jurisdiction to hear, try or determine the question of the amount of damage which the plaintiffs have sustained by reason of the prosecution of said writ of error, and the delay in consequence thereof.

Second. Because to allow attorneys' fees for plaintiffs' attorneys, for services rendered on account of such proceedings in error in the Supreme Court of the United States, would deny to the said railway company the equal protection of the law, and be in violation of the Constitution of the United States, and the acts of Congress passed in pursuance thereof.

Third. Because, if the said plaintiffs have any right to recover attorneys' fees, as an element of damage, the same cannot be recovered in this proceeding, and this court is without jurisdiction or authority to consider the same.

Which objection was by the Commissioner overruled, to which the defendant excepted; and such evidence of the witness J. G. 299 Waters was permitted to remain in the record.

JOHN F. SWTZER:

I am an attorney at law, and reside at Topeka, Kansas. Have practiced law twenty years. Am engaged in general practice. After the Larabee case had been disposed of in the Supreme Court of Kansas, and after the proceedings were instituted in the Supreme Court of the United States, Captain Waters came to me and asked me to assist him in the case. My office is located in the same building and on the same floor with his. (R., Vol. 2, p. 828.) After he asked me to assist him I read the record and Mr. Waters' brief. From that time on I worked with Mr. Waters in examining the authorities and discussing questions of law involved, and assisted in the preparation of briefs filed in the Supreme Court of the United States. We were almost in daily consultation until after the brief was prepared. (R., Vol. 2, p. 829.)

(The witness is too modest to testify as to the value of his fees, or of any other attorneys' fees in the case.) (R., Vol. 2, p. 841.)

Cross-examination:

"Q. You keep books of account, do you?

A. Yes, sir.

Q. Any charge on your books against these people?

A. I think not. (R., Vol. 2, p. 841.)

300 Q. You usually charge your clients for services performed?

A. As a rule.

Q. You never have made a charge against them on your books?

A. I don't think we ever entered any charge against the Larabees.

Q. Have you entered any charge against Waters & Waters?

A. No, sir; it was just arranged between myself and Mr. Waters as an individual as to the charge that should be made against them.

Q. Have you ever presented a bill or claim against the Larabee Flour Mills Company?

A. Never, except through Mr. Waters.

Q. Have you ever received a dollar from them?

A. Never a dollar in this litigation.

Q. Have you ever had any communication with them—I mean writing—have you made any demand for fees?

A. Not of them." (R., Vol. 2, p. 842.)

Q. You have been admitted to the Supreme Court of the United States?

A. No, sir.

Q. Never have?

A. Never have.

Q. Never appeared before that court in the capacity of a lawyer?

A. Never did." (R., Vol. 2, p. 843.)

Q. Can you, by having your attention called to any case referred to here, without looking them up, state what specific principle was decided upon which you rely in this case?

A. It has been so long since the brief was filed that I couldn't remember or pick out a case, and state what principle was decided in that particular case now without looking at the brief." (R., Vol. 2, p. 844.)

301 I had no consultation with Rossington & Smith about their brief.

Q. Never was consulted about it?

A. Never was.

Q. When did you first see that brief?

A. When they had it printed and handed it to Mr. Waters.

Q. If you were employed in the case, do you know why it was your name was not signed to it?

A. I do not." (R., Vol. 2, p. 846.)

I did not personally present any bill to anybody. I never had any correspondence with the Larabee Flour Mills Company.

Q. Can you refer to a single item of that decision (referring to the decision of the Supreme Court of the United States) which is responsive to the brief filed by Clad Hamilton, Joseph G. Waters, John F. Switzer and John C. Waters?

A. I don't remember the decision; that is, any particular portion of the decision as it was rendered." (R., Vol. 2, p. 847.)

CHARLES BLOOD SMITH:

"Q. Are you the Charles Blood Smith who is a member of the firm of Rossington & Smith?

A. I am.

Q. Have you in your possession the books of accounts of Rossington & Smith showing your accounts with the Larabee Flour Mills Company?

A. I have.

Q. Will you produce them?

A. I will not.

Q. I ask the witness to produce the books of Rossington
302 & Smith to show all charges made against the Larabee Flour Mills Company, growing out of this litigation, for services and expenses and all payments made on account of such charges and service.

A. I say I will not produce them. They are confidential. They contain confidential information between client and counsel, and I don't think are the subject of production before the court." (R., Vol. 3, p. 1211.)

"Q. The firm of Rossington & Smith, and yourself individually, kept a book or books showing all charges you made against your clients for services rendered and moneys expended, and showing all credits on account of payments made by them to you, did you not? (R., Vol. 3, p. 1212.)

A. We did.

Q. And the books of Rossington & Smith, and yourself, will show all charges made against the Larabee Flour Mills Company for services in the Supreme Court of the State of Kansas in this controversy, and in the Supreme Court of the United States, as well as all disbursements paid on account of expenses, and also all payments or credits made by the Larabee Flour Mills Company on account thereof?

A. They do not.

Q. What do those books show?

A. The general account against Larabee Brothers." (R., Vol. 3, p. 1213.)

I told Larabee we would charge him a \$500 retainer, and if we won a reasonable fee for services. Shortly after that he paid us \$250, and some four or five months later he paid the balance, \$250.

He has not paid anything since. (R., Vol. 3, p. 1215.)

303 "Q. Do you expect the Larabee Flour Mills Company to pay you whatever may be allowed in this controversy as attorneys' fees, independent of whether it is adjudged as a legal claim against the Missouri Pacific Company?

A. I expect them to pay me what would be considered a reasonable attorney's fee, independent of whether it is paid by the Missouri Pacific or not.

Q. Do you expect them to pay whatever is allowed here, even though the court shall ultimately decide that the Missouri Pacific is not liable therefor?

A. I don't know about that. Never considered that.

Q. Why have you not testified in this case as a witness on behalf of the plaintiff?

A. Because I didn't consider myself an expert.

Q. Did not consider yourself an expert?

A. No, sir.

Q. Are you not as much of an expert on fees as Mr. J. G. Walters?

A. Well, I don't know the value of lawyers' fees myself." (R., Vol. 3, p. 1216.)

But the witness proceeded to testify, in answer to the hypothetical question, that he should think \$5,000 to \$10,000 would be a reasonable attorney's fee. (R., Vol. 3, p. 1221.) The witness was persuaded, under order of the Commissioner, to finally produce his confidential books.

"Q. Have you no charge there showing your retainer?

A. No sir."

The first item or charge is "expressage, 34 cents." The next item is "By check, Larabee Brothers' Mill, account fees and expenses, \$293.50." And then other expenses connected with the
304 Larabee case. (R., Vol. 3, pp. 1222-1223.) (Pages 1223, 1224 and 1225 of Record, Vol. 3, show other items of expense charged.)

"Q. April 3d, p. 329—just read the item as it appears on the book there.

A. 'Larabee Brothers, April 23d, by check, Larabee Flour Mills Company, balance fee in Company vs. Missouri Pacific Railway Company, \$250.'" (R., Vol. 3, p. 1225.)

"Q. Does the check show that it is the balance of the fee?

A. I don't know anything about the check.

Q. That was in 1908. Now, have you placed on your book or books a single item of charge for services rendered since the receipt of that check of \$250—balance due on your fee?

A. Not services rendered. I have for expenses incurred.

Q. Have you since that date presented any bill to the Larabees?

A. Have not.

Q. Have you asked them for any money on account?

A. Have not.

Q. When this statement was filed claiming these fees here, was that in pursuance of an agreement and understanding between you and the Larabees?

A. What statement do you refer to?

Q. Claiming damages in this suit—did you see this statement before it was filed?

A. Yes, sir, I think I did." (R., Vol. 3, p. 1226.)

"Q. Who employed Mr. Houston?

A. I don't know.

Q. Did you?

A. No.

Q. Were you a party to it?

A. I ratified it.

305

Q. Are you to pay his compensation or the Larabees?

A. I haven't any idea. Never thought anything about it.

Q. Any agreement with him about compensation?

A. None whatever." (R., Vol. 3, p. 1227.)

"Q. Did you submit the brief to Mr. Switzer?

A. Did not.

Q. Ever have any consultation with him?

A. Never did.

Q. Did you know he was in the case?

A. Only by seeing his name on the first brief.

Q. When the Larabees employed you, and you told them it was subject to Mr. Waters' consent, did they advise you Mr. Switzer was in the case?

A. I said to Mr. Larabee when he came to retain us that I would be very glad to go in the case if it was satisfactory to counsel that were in the case. I don't know whether I specified Mr. Switzer or not. If I didn't I intended to do so.

Q. Do you know, in your connection with this case, of any service ever performed in the case by Mr. Switzer, of your own personal knowledge?

A. Not personal knowledge, no, sir." (R., Vol. 3, p. 1228.)

"Q. You have on your books, then, no charge, of any kind, nature or description, involving any part of this contingent fee you speak of?

A. None whatever.

Q. And you have never presented a bill?

A. Have not, except by presenting it to the court.

Q. How long did you argue the case before the Supreme Court of the United States orally?

306 A. Half an hour possibly." (R., Vol. 3, p. 1233.)

"Q. Had you intended to do anything of that kind, wouldn't you ordinarily have put it on your books?

A. No, I think not. We have always thought the Missouri Pacific would have to pay it.

Q. And for that reason you have made the amount what it is?

A. Well, quite liberal, yes, sir.

Q. Suppose you had been so unfortunate as our brother Rossington, to have died. You would have no record of this, would you?

A. Yes; have a record of our services.

Q. But nothing on your books to show that any more than the \$500?

A. No, I presume not." (R., Vol. 3, p. 1243.)

"Q. So you take into consideration the possible benefit to be derived by the Missouri Pacific Railway Company, and others like situated, in the event of a decision favorable to their contention in this case?

A. I do, in fixing my fees, yes, sir; have considered the importance of the questions involved." (R., Vol. 3, p. 1244.)

A. M. JACKSON:

I am an attorney at law. Was admitted in 1880. Am fairly well acquainted with the value of services of attorneys in this state, in state and Federal courts. (R., Vol. 2, p. 685.)

307 "Q. I will put this question to you, Judge Jackson: A case was commenced by the Larabee Flour Mills Company against the Missouri Pacific Railway Company in the Supreme Court of the State of Kansas for a writ of mandamus compelling the Railway Company to resume the transfer and return of cars loaded or unloaded from the line of carrier to the flour mills and elevator of the particular shipper, on the Larabees' personal request, and demand as such shipper, and upon payment of the customary charges. The plea in abatement was filed, the application for the writ presented and heard by the Supreme Court, and a demurrer to the plea was presented by the shipper, Milling Company, and heard by the Supreme Court. Answer was filed, commissioner was appointed to take evidence and find the facts, and the whole matter was presented to the Supreme Court of the State of Kansas to determine, and an elaborate opinion handed down, and judgment in favor of the shipper, the Larabee Flour Mills, handed down by the Supreme Court of the state. This entailing the ordinary work and service that such a process usually entails in court, the Milling Company being represented by an old and experienced firm of lawyers, Waters & Waters. After the decision of the Supreme Court of the State of Kansas the case was taken by the Missouri Pacific Railway Company to the Supreme Court of the United States, and in the various proceedings resulting in the presentation of the case to the Supreme Court of the United States a long brief of 107 pages was filed by the Railway Company. Thereupon, and in due course, a brief in answer was filed by the attorneys for the Mill Company, containing 40 pages, by Waters & 308 Waters and John F. Switzer. Thereupon, owing to the peculiar skill of Rossington & Smith in Federal practice, and their peculiar knowledge of law, and their ability and standing as lawyers, they were employed to assist, and they likewise filed in the Supreme Court of the United States a motion of 22 pages to file and consider amendments to the record, which was successful, and a release to the request granted by the Supreme Court, and in due time a further brief, in answer to the original brief of the Missouri Pacific, was filed by Rossington & Smith of 39 pages; and thereafter an additional brief was filed in the case in the Supreme Court of the United States by the Railway Company consisting of 129 pages; and thereafter, and after two trips had been made by Rossington & Smith and by Colonel Waters to Washington, extending over about twelve days each, the case was presented to the Supreme Court of the United States on these briefs and on oral arguments made by Rossington & Smith and Colonel Waters for the Mill Company, and by the Hon. B. P. Waggener for the Railway Company; and thereafter the decision of the Supreme Court of the State of Kansas, which was in favor of the Mill Company, and

granted the release in full prayed for, was confirmed in all respects by the Supreme Court of the United States; and thereafter a petition for a rehearing was filed by the Railway Company, consisting of 60 pages, which was presented and argued by the respective parties, and denied by the Supreme Court of the United States; and there-

after a procedure was had in the Supreme Court of the State
309 of Kansas whereby the Railway Company sought to render null and ineffectual the result of the decision of the Supreme Court of the State and of the United States, and where, by virtue of the contention of the two parties, the plaintiff and defendant, and by virtue of the issues presented in the pleadings and proceedings and briefs, it was affirmed on the one side and sought to be established on the one side, mainly by the Larabee Mill Company, that a common carrier is bound to treat all shippers alike, and can be compelled to do so by mandamus or other proper writ, irrespective of legislative action for special mandates from any commission or other administrative board, and that proposition was denied by the Railway Company; and it was further sought by these proceedings, briefs and pleadings, and by this action, to establish and affirm on the part of Larabee Mill Company that the mere delegation by Congress to the Interstate Commerce Commission of certain national powers over interstate commerce is not the equivalent of the specific action by Congress in respect to the particular matters involved which prevents a state from making regulations conducive to the welfare and the convenience of its citizens that may indirectly affect commerce, and where that proposition was denied and controverted by the Railway Company, and where it was sought further by these proceedings, pleadings and briefs, and by means of that action, to establish affirmatively that the compelling of a carrier by mandamus to discharge its common law duty to treat all shippers alike by resuming the transfer and return of cars, loaded

and unloaded, between the line of a connecting carrier and
310 the flour mill and elevator of a particular shipper, upon the latter's request and demand, and payment of the theretofore customary charges, is not beyond the power of the state court—at least until Congress or the Interstate Commerce Commission takes specific action—although both carriers are engaged in interstate commerce and three-fifths of the output of the mill are shipped out of the state, and where that is sought to be established and controverted by the Railway Company, and where the lawyers, Rossington & Smith, devoted their time and skill sufficiently to present, in the briefs mentioned, of the length mentioned, these propositions which I have mentioned to the Supreme Court successfully, and where Colonel Waters has, with the constant aid and assistance and advice of John F. Switzer, prepared and filed the brief of the length mentioned, and contested the case to a successful close, involving the proposition mentioned, you may state what, in your opinion, the reasonable value first of John Switzer for such assistance would be?

Mr. WAGGENER: The defendant, the Missouri Pacific Railway Company, objects to the question as to the services performed in the

litigation in the Supreme Court of the State of Kansas and in the Supreme Court of the United States for the following reasons:

First. Because the section of the Code which reads, 'If judgment be given for the plaintiff, he shall recover the damages which he shall have sustained, to be ascertained by the court or jury or by referee, as in a civil action,' and costs, etc., as construed by the

Supreme Court of the State of Kansas, allowing the plaintiff in such an action, as an element of damages, an attorney's fee, is in violation of the Constitution of the United States, in denying the said defendant the equal protection of the law, and gives to a plaintiff in such controversy rights and privileges and protection on account of damages that are not given to the defendant under like circumstances and conditions, and because of such prohibition of the Constitution of the United States the said defendant is not liable in this action for any attorneys' fees paid out, or agreed to be paid out, by the said plaintiff in this controversy.

Second. Because, according to the rules and practice of the Federal Court, and especially of the Supreme Court of the United States, as decided by that court, attorneys' fees cannot be recovered in any action on account of damage in any suit pending in such court, and to allow such attorneys' fees for services rendered in the Supreme Court of the United States would be in violation of the established rules of that court, and the decision thereof, and in violation of the Constitution of the United States, as a denial to the said defendant of the equal protection of the law.

Third. Because the said plaintiffs, if they have any remedy whatever, on account of such damage, should be based upon the supersedeas bond which has been given, and which takes the place of all claims for damages under and by virtue of said provision of the Code to which reference is hereinbefore made.

Fourth. Because to allow the said plaintiff to recover attorneys' fees for services performed either in the Supreme Court of the State of Kansas or of the Supreme Court of the United States in this action would deny to the said defendant the equal protection of the law, and give to the said plaintiff a right, privilege and remedy which, under the statutes of the State of Kansas, as construed by the Supreme Court of the State of Kansas, is denied to the defendant in such action.

Fifth. Because in this particular action to allow the plaintiff to recover as damages attorneys' fees paid out, or agreed to be paid out, would be to give to the said plaintiff an unequal and unjust advantage, because, under the decision of the Supreme Court of the State of Kansas construing said statute the said defendant cannot, under any circumstances, recover attorneys' fees in the event it should have been successful in this litigation, and therefore, as construed by said court, such rules deny to the said defendant the equal protection of the law, and is in violation of the Constitution of the United States.

Sixth. Because the said plaintiffs have made no showing that they have agreed to pay the said plaintiffs' attorneys any particular sum of money, or that they have paid any particular sum of money, and

that the damages claimed on account of attorneys' fees are speculative, conjectural and contingent, and are not legally or properly involved in this controversy, and all evidence should be excluded proving, or tending to prove, such services, or the value thereof, as incompetent, irrelevant and immaterial. And upon the further

ground that the hypothetical question submitted to the witness is not a correct statement of the facts in connection with this controversy, and no foundation laid to ask the question."

Which objection was by the Commissioner overruled, defendant excepted, and witness was permitted to answer:

I think it would be from forty to fifty thousand dollars. (R., Vol. 2, p. 692.)

I never had any experience in the trial of cases involving the operation of railroad trains and switch service. (R., Vol. 2, p. 694.) I would not consider it to be a reasonable price for any lawyer to charge a man \$40,000 or \$50,000 for establishing a right to \$24,000. (R., Vol. 2, p. 696.)

Substantially the same question was asked of the witness Robert J. Brock. (R., Vol. 2, p. 699.) The same objection was made, which was overruled by the Commissioner, and witness was permitted to answer:

"A. I should say \$25,000 for all services." (R., Vol. 2, p. 702.)

All of the witnesses, attorneys who were examined as witnesses on behalf of the plaintiffs, were asked substantially the hypothetical question herein fully copied, and, over the objection and subject to the exception of the defendant, they were permitted to answer such question.

A. M. HARVEY:

I have resided at Topeka since 1887. Have been in the practice of law since 1893.

The same hypothetical question was asked of this witness, and, subject to the same objection of the defendant, he was permitted to answer (R., Vol. 2, p. 746):

"A. I should say \$35,000 would be a reasonable fee for the entire work, from what is shown in the question, for Waters & Waters would be \$20,000; Rossington & Smith, \$10,000, and John F. Switzer, \$5,000." (R., Vol. 2, p. 750.)

"Q. I will ask you, did you take into consideration the financial ability of the defendant in this case to pay the fees?

A. I did.

Q. To what extent?

A. That they are able to pay it." (R., Vol. 2, p. 752.)

Referring to the services of John F. Switzer, the following questions were asked of the witness Harvey:

"Q. You don't know how many hours he put in?

A. No, sir.

Q. You don't know how many days he put in?

A. No, sir.

Q. Or how much time he and Waters consulted together?

A. No, sir.

Q. And yet, with this brief statement, you reach the conclusion it was \$5,000?

A. In connection with all the other facts in the case." (R., Vol. 2, p. 757.)

E. S. QUINTON:

I am an attorney at law and reside at Topeka. (R., Vol. 2, p. 763.)

315 To this witness was propounded the same question, being Exhibit "A" attached to the record, hereinbefore copied; to which defendant objected for the reasons specially mentioned (R., Vol. 2, pp. 764-766), which objection was by the Commissioner overruled, defendant excepting, and the witness answered that a fee of \$50,000 would be a reasonable fee.

"Q. In making your estimate for services in this case, did you take into consideration the financial ability of the defendant to pay?

A. Yes, sir." (R., Vol. 2, p. 768.)

LEE MONROE:

I am an attorney at law, and reside at Topeka. I have been practicing since 1883. Am acquainted with the value of legal services.

Witness was asked the hypothetical question, Exhibit "A," to which defendant interposed the same objection as hereinbefore copied, which was overruled, and witness was permitted to answer (R., Vol. 2, p. 789):

"A. \$30,000." (R., Vol. 2, p. 793.)

I have not read the opinion of the Supreme Court of the United States in this case (R., Vol. 2, p. 795), and do not know what questions are decided there. (R., Vol. 2, p. 796.)

The plaintiffs also called, as witnesses, attorneys at law George H. Whitcomb (R., Vol. 2, p. 810), M. M. Miller (R., Vol. 2, p. 817), W. E. Stanley (R., Vol. 2, p. 860), Thornton W. Sargent (R., Vol. 2, p. 876), Kos Harris (R., Vol. 2, p. 885), J. F. Getty (R., Vol. 2, p. 895), W. F. Guthrie (R., Vol. 2, p. 896), J. H. Atwood (R., Vol. 2, p. 913), William G. Holt (R., Vol. 2, p. 927), E. C. Little (R., Vol. 2, p. 934), L. C. Boyle (R., Vol. 2, p. 940), and submitted to each one of said witnesses the following hypothetical question:

"In this case a peremptory writ of mandamus was awarded by the judgment of the Supreme Court of Kansas, requiring the defendant to resume the transfer service over a switching track; the defendant prosecuted its writ of error to the Supreme Court of the United States, and the Honorable B. P. Waggener, appearing for it as its

sole counsel, filed two briefs of about 230 pages in the aggregate, in that court, setting up and contending for the following propositions:

First. That the service required by the state court was an interstate service, of which it had no jurisdiction, and the subject matter or controversy was governed by the acts of Congress to regulate commerce and not by state law or courts.

Second. That the defendant was not under legal obligation to perform the service, it being interstate commerce.

Third. That the judgment of the state court denied the defendant the equal protection of the laws and a compliance with it would deprive the defendant of its property without due process of law and without compensation.

317 Fourth. That the state court had no jurisdiction; that under the provision relating to commerce in the Constitution of the United States and the acts of Congress relating thereto, all railways engaged in an interstate commerce traffic are, as to all its instrumentalities of track, cars, crews, engines, switches and facilities, under the exclusive control of Congress and the interstate commerce acts, both as to interstate commerce and intrastate commerce, and that the state through its legislatures, courts and commissions have, as to such inter and intrastate traffic, no power or authority, except as an exercise of police power or the power of eminent domain.

Fifth. That the judgment of the state court was legislative and not judicial and void.

Each of these propositions was briefed and argued orally by both sides in the Supreme Court of the United States. The case was finally decided in the Supreme Court of the United States in favor of the plaintiff, the Mills Company, by affirming the judgment and dismissing its writ of error; thereupon, the defendant filed its motion for a rehearing and its printed brief of sixty pages in support of such motion, which motion was heard and overruled.

In the three briefs filed, aggregating over 296 pages, 186 pages were devoted to the discussion of the fourth proposition, in which briefs the counsel for defendant declared it was a question of great moment (Brief 1, p. 105); that it involved the respective powers of the state and Federal governments (Brief 1, p. 106); that Congress

318 had, by appropriate legislation, placed every state carrier and all its instrumentalities under the exclusive control and supervision of a Federal agency, and that to permit the states to resume the power after having consented to the commerce clause in the Federal Constitution would result in imperiling the stability of our government (Brief 1, p. 107); that the Supreme Court of Kansas had assumed jurisdiction to prescribe rules and regulations as to the carrier and its instrumentalities which had been fully provided by the acts of Congress (Brief 1, p. 107); that there was no possible theory in view of the decisions of the Supreme Court of the United States that such an order could be sustained (Brief 1, p. 102); that the conclusion is irresistible that the order of the Supreme Court of Kansas is an attempt to control the instrumentalities of a carrier used by it in the discharge of its duties and obligations

as prescribed, defined and fixed by the acts of Congress (Brief 1, p. 100); that this was not considered a factor in the Supreme Court of Kansas (Brief 1, p. 101); that it would be equally unlawful for any state, by rule or regulation, to attempt to control or superintend any instrumentality of interstate commerce, especially in view of the fact that Congress, by its affirmative legislation, has covered the whole field of operation (Brief 1, p. 96); that it is utterly impossible for an interstate carrier to give allegiance to the acts of Congress and at the same time observe and obey the many rules and regulations of these state commissions (Brief 1, p. 96); that to give these powers to a state, constitutional guaranties would be swept away as

319 idle vagaries, and these millions of dollars taken from the control of the owners, and placed under the exclusive management of a political agency, with powers so great as to startle and stagger the financial markets of the world (Brief 1, p. 94); that interstate commerce roads with all their switches, spurs, tracks and terminal facilities and all their freight depots, yards and grounds used or necessary in its interstate traffic, by force of the Constitution and acts of Congress passed in pursuance thereof are within the jurisdiction of the United States and therefore necessarily the power and jurisdiction of the state is at an end (Brief 1, p. 91); that the question is one of national character and importance and that the Supreme Court of the United States in its many decisions referred to has repeatedly and consistently adhered to the principle that as to such cases, that the United States are but one country and are and must be subject to one system of regulations, and not to a multitude of systems (Brief 1, p. 90); that if the carrier is an interstate carrier, then all of the road in use, even though such road may be used by the same carrier for intrastate business, is under the exclusive jurisdiction of the United States (Brief 1, p. 89); that the regulation of commerce, and all instrumentalities of commerce, is a national question no one can gainsay or deny. The passage of the Hepburn Bill, and the provisions of the same, taken in connection with the original Interstate Commerce Act, most conclusively demonstrates that it was the intention of Congress to place every officer, employé, servant and agent, as well as the business, of every interstate carrier, including the tracks, cars, equipment and in-

320 strumentalities, of every kind, nature and description, under the exclusive control and supervision of the Interstate Commerce Commission. No joint or divided jurisdiction and power was conferred, or attempted to be delegated. To permit a state, now that Congress has acted, to exercise any control over the interstate carrier, or any of the instrumentalities of interstate commerce, will necessarily result in that confusion and conflict which this court has so uniformly condemned. It is true that all interstate carriers transport and handle intrastate business, but is not such business a matter of grace, rather than of right? If handling intrastate business, by an interstate carrier, should prove to be a burden upon interstate commerce, would not Congress have the right to interdict and prohibit it? Has not Congress already delegated to the Interstate Commerce Commission ample power to interdict and prohibit such

intrastate business, if it should be made to appear that engaging in such intrastate business was a burden upon interstate business? Can the commerce of this great country, which has increased in volume far in excess of the transportation facilities, be controlled and regulated, except through "one uniform system or plan of regulation?" (Brief 1, p. 47); that the railroad tracks, spurs, switches, terminals, depots and yards of the Santa Fe and Missouri Pacific Companies at Stafford were instrumentalities of interstate commerce, and as such the regulation and control thereof vested exclusively in the Interstate Commerce Commission. The judgment of the state court is necessarily a regulation, not only of interstate commerce, but the

321 instrumentalities of interstate commerce, within the meaning of the Federal Constitution (Brief 2, p. 74); that the whole part of the act demonstrates that the legislative mind intended a purpose to exercise exclusive control over every instrumentality of interstate commerce, and every agency by and through which it was carried on (Brief 2, p. 77); what did Congress mean when it said this act shall apply to any common carrier engaged "in the transportation of passengers and property wholly by railroad" from one state to another, except to clearly define the carrier subject to the provisions of the act? What did Congress intend when it defined the term "railroad" as including "all the road in use by any corporation operating a railroad," and "should also include all switches, spurs, tracks and terminal facilities, of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards and grounds used or necessary in the transportation or delivery of any of said property"? Did Congress mean to vest in the Interstate Commerce Commission exclusive or only partial control, supervision and jurisdiction over the "railroad" as thus specifically defined and described? If it was intended only a partial control, supervision and jurisdiction over the instrumentalities of interstate commerce, what section or word in the entire act may be pointed to as indicative of such purpose? It cannot be found in the act (Brief 2, p. 78); that if the decision of this court, to which reference has been made, left the question in

322 any doubt, does not this last expression of Congress conclusively demonstrate that it was the intention of Congress to place every interstate carrier, together with all tracks, spurs, switches, cars, elevators, etc., used by such carrier, under the exclusive control and supervision of the Interstate Commerce Commission? If this is a correct interpretation of the Act of Commerce, has the state, by mandamus or otherwise, the right to direct the use, or manner of use, of any instrumentality of an interstate carrier? When the carrier becomes an interstate carrier, does it not at once, by virtue of the statute, become a Federal agency? Does not "all the road used" by such carrier, and "all switches, spurs, tracks and terminal facilities, of every kind, used or necessary in the transportation of persons and property" from one state to another, and all freight depots, yards and grounds used or necessary in the transportation, elevation or delivery of any of said property, pass under the immediate and exclusive control and supervision of the Interstate

Commerce Commission? Can any other reasonable or logical construction be placed upon the language employed by Congress in the statute? The words "all" of the instrumentalities "used" are most significant. Every mile of track "used," every "switch," "spur" or "terminal facility" "used," every "car," "depot," "elevator," "yard" and the "grounds" "used" by an interstate carrier are brought under the jurisdiction and control of the Interstate Commerce Commission. While Congress probably intended to except intrastate commerce, that is, articles of barter and trade, from the operation of the act, yet the interstate carrier, as such, and all instru-

323 mentalities used by it, are brought within the operation of the act, and under the jurisdiction and exclusive control of the federal government (Brief 2, p. 81); that the "railroad" of the Santa Fe at Stafford, and the "railroad" of the Missouri Pacific at Stafford, and their respective "switches, spurs, tracks and terminal facilities, of every kind," are used by these interstate carriers possibly every hour of the day as necessary instrumentalities in the movement and transportation of interstate passengers and freight, and yet the state court, by its mandate and order has denied the supervision of the Interstate Commerce Commission, the exclusive jurisdiction of the federal courts, as fixed by the Hepburn Bill, denied to the railroad company the equal protection of the law, and, by a "regulatory order," placed the use of the instrumentalities of these interstate carriers, subject to the demand of the Mill Company, "upon the payment of the heretofore customary charges therefor," and brands it "due process of law" (Brief 2, p. 86); that it is irresistible that Congress meant to withdraw from the operation and effect of the Act, only the articles of intrastate commerce, as contradistinguished from the carrier itself (Brief 1, p. 89). The question has become intensely national. Population is increasing. New territory is being opened. The semi-arid districts on every hand are presenting evidences of successful agriculture, and the one thing needed, the developing influences of increased railroad transportation, protected and regulated by and through the power of centralized government, unembarrassed by state regulation and control." (Brief 2, p. 129.)

324 If this case had been decided in favor of the defendant, the plaintiff would have been compelled to pay the costs of this proceeding, of about one thousand dollars, which have been paid by the defendant, would have been compelled to pay his attorneys without obtaining the same from defendant, would have been required to suffer at its own cost and expense the damages already sustained from the shutting off the transfer track, about \$24,000, and would sustain at its own cost and expense all such damages which might accrue in the future, so long as it did business at its mill, except upon terms designated by defendant, and which would establish such precedent in like cases at all stations similarly situated to Stafford, on all the railways in the United States doing an interstate commerce business. The effect of a decision in favor of this proposition would be to blot out and destroy every state in the Union, so far as the power to legislate, adjudicate or control the interstate railways, in

carrying everything; all domestic commerce of every kind and nature, as well as all interstate commerce; with no power or authority on the part of the states, over the tracks, cars, trains, switches, crews, road bed, or appliances, and leaving all the states, their legislatures, their courts, their railroad boards and commissions, powerless and helpless in their own domestic traffic, and wholly without power to regulate or control a railway that at all engaged, much or little, in interstate commerce, unless it were the exercise of police power, or the right of eminent domain.

325 In the briefs are also contained very many authorities, mostly of the federal courts, which, he asserted, sustained this proposition. The distinguished counsel argued this contention orally before the Supreme Court of the United States. In brief and oral argument he was strong and forceful. He is one of the distinguished lawyers of the United States; stands very high in the profession and his words are given much weight in the courts. He advanced this, as well as all the other propositions asserted in this question, in the very best of good faith; he believed in them, and his profound conviction, all through the case, was that the Supreme Court of the United States had decided it in his favor and would be compelled to sustain him in this case. It was a controversy before the highest court in the world, and so far as this proposition was concerned, the distinguished counsel for defendant advanced it, briefed it, argued it and compelled the plaintiff to meet it; there was no way of avoiding such a momentous proposition, national in its scope, as characterized by Mr. Waggener in his briefs, and the plaintiff argued it, discussed it, briefed it and met it. It commanded the attention of that court as will be seen by the opinion of the judges. While it vitally affected every state in the Union had his contention been successful, for the protection of the plaintiff's individual standing and success in this case, the burden was upon the plaintiff to defend against such a proposition, to protect its own interests. In the decision of Judge Brewer, he decided every proposition against
326 the defendant and affirmed the decision of the Supreme Court of Kansas and declared this particular proposition as the main contention of the railway company along an entirely different line. This proposition was not raised or argued in the Supreme Court of Kansas, and was not considered as a factor in its decision. The plaintiff, on the case going to the Supreme Court of the United States, felt the necessity of engaging additional counsel to combat such a serious and far reaching contention, designated by Mr. Waggener as a momentous and national controversy, involving the stability of the government.

Waters & Waters gave the case their best thought, labor and attention for many months. They were the original and only attorneys at first. The Larabees, on the case going to the Supreme Court, felt, as we have stated, the necessity of engaging additional counsel and engaged Rossington & Smith and John F. Switzer of Topeka, all ranking high in their profession. Mr. Rossington gave it his best labor and attention, consuming much of his time, and his firm filed an independent brief covering all the phases of the controversy; Ross-

ington & Smith had before this much business in the Supreme Court of the United States and had been successful practitioners there and stood in high estimation in that court. Mr. Rossington went to Washington in April, 1908, to argue this cause and consumed about ten days in so doing. J. G. Waters also went to Washington for the same purpose in April, 1908, consuming about
327 twelve days in so doing; the expense of such journeys being borne by the plaintiff; John F. Switzer upon his employment with J. G. Waters consulted together, examined authorities in great numbers and took much time in the preparation of the brief and case. This cause was not reached at that term. In October, 1908, J. G. Waters again went to Washington to orally present the case and so did Charles Blood Smith as Mr. Rossington had died; and who, upon the death of Mr. Rossington, prepared himself to assist in presenting the case orally before the Supreme Court; each consumed about ten days in so doing. The case and propositions urged by the Missouri Pacific were all presented in fair argument. Mr. Waggener made an oral argument and so did J. G. Waters and Mr. Charles Blood Smith. The firm of Waters & Waters, the firm of Rossington & Smith and Mr. John F. Switzer each had separate engagements with the plaintiff, and their respective fees are not shared in by the others. Each was promised a reasonable and fair fee for the services to be performed by the plaintiff.

Now, from this statement, if the same is true, what in your opinion should the plaintiff be entitled to recover for a reasonable and fair fee for the services of the firm of Waters & Waters, for the services of Rossington & Smith, and for the services of John F. Switzer in this case in the Supreme Court of the United States?

To which the defendant at the time duly and seasonably objected to each of said witnesses answering the said hypothetical question, for the following reasons, to-wit:

328 First. Because the assumed facts stated in such question are not true. The same is argumentative, an extravagant statement of the issues involved, and is not a fair presentation of any facts justifying an answer thereto by the said witnesses.

Second. It is not true, as stated in such hypothetical question, that, if the case had been decided in favor of the defendant, the plaintiffs would have been compelled to pay costs of the proceedings, about \$1,000, and would have been required to suffer, at its own cost and expense, the damage then already sustained by shutting off of the transfer track, \$24,000.00; and it is wholly immaterial whether the decision in the said case would establish a precedent in like cases at all stations similarly situated to Stafford along all railways in the United States doing an interstate business.

Third. It is not true that the effect of a decision in favor of the proposition contended for would be to blot out and destroy every state in the Union so far as the power to legislate, adjudicate or control the interstate railroads, in carrying everything, all domestic commerce, of every kind and nature, as well as all interstate commerce. There is no power or authority on the part of the states over the

tracks, cars, trains, switches, crews, roadbed, or appliances, etc., as stated in such question.

Fourth. It is not true, as therein stated, that the said case required the labor and attention of Waters & Waters for many months.

329 Fifth. For the reason that the issues involved in said case, as decided by the Supreme Court of the State of Kansas (Larabee Flour Mills Company v. Ry. Co., 74 Kan., 808), and as affirmed by the Supreme Court of the United States (Mo. Pac. Ry. Co. v. Larabee Flour Mills Co., 212 U. S., pp. 612-627), only involved in the Supreme Court of the State of Kansas a question of damage and of discrimination, and whether or not, on the evidence and facts as found by the Commissioner and reported to the Court, the handling of the cars over said transfer track constituted interstate or intrastate commerce; and, while a discussion of these questions in the Supreme Court of the United States necessarily involved an elaboration of the questions, yet no disastrous results could possibly follow from the decision, as outlined by the hypothetical question, and made the basis of the witnesses' answers thereto, and that the decision of the Supreme Court of the United States was made upon other and different lines than that indicated in such hypothetical question, as shown by such decision, to which reference is now here made.

Sixth. Defendant further objects to such hypothetical question, and the answers thereto, because the said plaintiffs are not entitled to recover as damages herein any attorneys' fees paid, or contracted to be paid, or otherwise, for services by them claimed in such proceedings so instituted in the Supreme Court of the United States, for the purpose of reviewing the judgment and decision of the Supreme

330 Court of Kansas, for the reason that to allow said plaintiffs any recovery herein on account of attorneys' fees in such proceeding in the United States Supreme Court would be to deny to the defendant the equal protection of the law, and deprive it of its property without due process of law, and would be in violation of and conflict with the Constitution and laws of the United States.

Seventh. Because it is provided by the Act of Congress (Secs. 1000, 1003 and 1010), as follows:

"Every justice or judge signing a citation on any writ of error shall, except in cases brought up by the United States or by direction of any department of the government, take good and sufficient security that the plaintiff in error or the appellant shall prosecute his writ or appeal to effect, and, if he fail to make his plea good, shall answer all damages and costs, where the writ is a supersedeas, and stays execution, or all costs only where it is not a supersedeas as aforesaid."

"Writs of error from the Supreme Court to a state court, in cases authorized by law, shall be issued in the same manner, and under the same regulations, and shall have the same effect, as if the judgment or decree complained of had been rendered or passed in a court of the United States."

"Where, upon a writ of error, judgment is affirmed in the Supreme Court or a Circuit Court, the court shall adjudge to the re-

spondent in error just damages for his delay, and single or double costs, at its discretion."

331 And this Court has no jurisdiction in the premises, because, on the 24th day of December, 1906, it appears from the record herein, and as stated, that such proceedings in error were instituted in the Supreme Court of the United States, and a bond and undertaking given, as provided by the Acts of Congress, which, under order of the Court, operated as a supersedeas, and removed said controversy from the jurisdiction of the Supreme Court of Kansas, and transferred the same to the Supreme Court of the United States, and, under the decisions of said Court, attorneys' fees are not recoverable, except when allowed by that Court, under the rules of procedure adopted by that Court; and because it appears, and as stated in this case, that, on the affirmance of such judgment by the Supreme Court of the United States, an attorneys' fee of twenty dollars was allowed to plaintiffs, on account of their attorneys, and judgment was entered therefor against the defendant by said Court, and said attorneys' fee of twenty dollars was paid to said plaintiffs and their attorneys by said defendant, and due receipt taken therefor, in full accord and satisfaction of such judgment and liability so fixed by said Court, under and in pursuance of said statute.

Eighth. Defendant further objects to said question because the statute of the State of Kansas, as construed by the Supreme Court of Kansas, allowing to plaintiffs, in mandamus proceedings, as damages, attorneys' fees, when such statute does not authorize attorneys' fees to be allowed to the defendant in such proceedings, under any circumstances, is rendered unconstitutional and void, denies to the defendant in litigation the equal protection of the law, de-
332 prives it of its property without due process of law, and is in conflict with the Constitution of the United States, and the laws made in pursuance thereof.

Which objection was by the Commissioner overruled, to which defendant at the time duly and seasonably excepted, and each of said named witnesses testified, as disclosed by the Record, fixing the value of attorneys' fees for plaintiffs' attorneys, in such proceeding in the Supreme Court of the United States, at from \$30,000 to \$50,000. Defendant in each instance moved to strike out the answer of the witness, placing a valuation upon said attorneys' fees, for the reasons stated in the objection to such hypothetical question, which motion was by the said Commissioner in each instance overruled, defendant excepting.

The plaintiffs also introduced evidence tending to prove damages which they had sustained in the operation of their mill by reason of the interruption of such switching service after the date of the rendition of such judgment in the Supreme Court of Kansas, to-wit: on December 8th, 1906, and also after the date of the institution of such proceedings in the Supreme Court of the United States; and the bond having been executed, and approved, ordered to operate as a supersedeas, to-wit: on the 24th day of December, 1906.

To all which evidence the defendant at the time duly and season-

ably objected, for the same reasons as hereinbefore set forth, in substance, that, to allow such damages, would deprive the said defendant of the equal protection of the law; and for the further
 333 reason that this Court had no power or jurisdiction to consider any evidence as to any damage which the said plaintiffs sustained, or claimed to have sustained, after the date of the rendition of such judgment in the Supreme Court of the State of Kansas, which objection was by the Commissioner in each instance overruled, to which the defendant at the time duly and seasonably excepted.

The defendant introduced the following witnesses, who testified as to the value of attorneys' fees:

MATT G. CAMPBELL, for defendant: \$750. (R., p. 1250.) My best judgment, \$1,500. (R., p. 1255.)

M. A. Low: \$1,000, state court; \$1,000 in United States Court. Out of this fee in the United States Supreme Court should be deducted the expense of both trips, and if going to two attorneys, the balance should be divided between them. (R., pp. 1275-1276.)

O. J. Wood: \$1,000 in Supreme Court of Kansas (R., p. 1283); from \$1,000 to \$1,500 in United States Supreme Court. (R., p. 1289.)

J. D. McFARLAND: \$1,000 to \$1,500 (R., p. 1301), in state court, and same in United States Court. (R., p. 1306.)

J. S. WEST: \$1,000 in Supreme Court of Kansas (R., p. 1318); \$1,500 and expenses in Supreme Court of United States (R., p. 1322); \$30,000 or \$40,000 would not be too much if it involved the actual life and vitality of a business to make that a reasonable basis at all. (R., p. 1343.)

T. F. GARVER: \$1,000 and expenses in the State Supreme
 334 Court (R., p. 1352), and \$1,500 and expenses in United States Supreme Court. (R., p. 1356.)

W. R. SMITH: \$1,000 to \$1,200 in State Supreme Court (R., p. 1380), and \$2,500 in United States Supreme Court. (R., p. 1385.)

J. G. SLONECKER: \$500 and \$25 a day in Supreme Court of Kansas (R., p. 1404), and \$2,000 or \$3,000 and expenses in United States Supreme Court, and actual expenses. (R., p. 1408.)

H. L. ALDEN: \$750 in State Supreme Court, and \$2,000 in United States Supreme Court. (R., p. 1410.)

R. MILLER: \$1,000 in State Supreme Court, and \$2,000 to \$2,500 in United States Supreme Court. (R., p. 1422.)

A. L. BERGER: \$1,000 in State Supreme Court, and \$2,000 in United States Supreme Court. (R., p. 1425.)

Defendant offered in evidence sections 1000, 1003 and 1010, chapter 18, of the Judiciary Act of the United States Statutes, Vol. 1, United States Compiled Statutes 1901, pp. 712-715:

(SEC. 1000.) "Every justice or judge signing a citation on any writ of error shall, except in cases brought up by the United States or by direction of any department of the government, take good and sufficient security that the plaintiff in error or the appellant shall prosecute his writ or appeal to effect, and, if he fail to make his plea good, shall answer all damages and costs, where the writ is a

supersedeas, and stays execution, or all costs only where it is not a supersedeas as aforesaid."

335 (SEC. 1003.) "Writ of error from the Supreme Court to a state court, in cases authorized by law, shall be issued in the same manner, and under the same regulations, and shall have the same effect, as if the judgment or decree complained of had been rendered or passed in a Court of the United States."

SEC. 1010.) "Where, upon a writ of error, judgment is affirmed in the Supreme Court or a Circuit Court, the court shall adjudge to the respondent in error just damages for his delay, and single and double costs, in its discretion."

And also the following rules of the Supreme Court of the United States:

(Rule 23.) "In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at a rate not exceeding ten per cent, in addition to interest, shall be awarded upon the amount of the judgment."

(Rule 24, sub-division 2.) "In all cases of affirmance of any judgment or decree in this Court, costs shall be allowed to the defendant in error or appellee, unless otherwise ordered by the Court."

It is conceded that there was taxed costs in the Supreme Court of the United States against the plaintiff in error, the Missouri Pacific Railway Company, in behalf of the defendant in error, the Larabee Flour Mills Company, an attorneys' fee of twenty
336 dollars, and judgment entered therefor, and which said attorneys' fee so assessed against said Railway Company, was paid by it to the said Larabee Company, and by the Larabee Company received; and that all costs in the Supreme Court of the United States taxed against said Railway Company were duly paid by it.

Abstract of Evidence Proving and Tending to Prove that said Plaintiffs, from August, 1906, to April 1st, 1907, and Long Prior and Subsequent Thereto, Were Members of and Belonged to a Combination and an Association, in Violation of an Act of the State of Kansas "Defining and Prohibiting Trusts, Providing Procedure to Enforce the Provisions of This Act, and Providing Penalties for the Violation of the Provisions of This Act," Being Chapter 113a, General Statutes 1901, and Sections 2427 and 2443, Chapter 31, Article 13, General Statutes of Kansas, 1901, and in Violation of the Sherman Anti-Trust Act of Congress.

The transcript of the evidence discloses the fact, without contradiction, that long prior to the first day of August, 1906, there was organized a club or association known as the "Southern Kansas Millers' Commercial Club," and that it included all of the millers,
337 or persons engaged in the milling and grain business, in Southern Kansas, including both of the plaintiffs herein; and that such association adopted by-laws which provided that:

"The object of this club shall be the mutual benefit of all its members, by the cultivation of a spirit to 'live and let live,' the protection of each other, so far as possible, from all unjust demands by patentees, unlawful discrimination in freights, the securing of the lowest possible rates of insurance in good, reliable companies, to facilitate the speedy adjustment of business disputes, to acquire and disseminate valuable commercial and economical information, and, generally, to secure to its members the benefits of co-operation in furtherance of their legitimate pursuits."

And which provided that:

"The officers of this club shall be a president, first vice president, second vice president, secretary, treasurer, and an executive committee of five."

The duties of its said officers were defined as follows:

"President.—The duties of the president are such as usually pertain to his office. In the absence of the president one of the vice presidents shall perform his duties.

Secretary.—The secretary shall be the executive officer of the club. He shall attend to all correspondence, collect all entry fees and assessments and pay the same over to the treasurer, taking his receipt for the same. Keep a full and faithful record of the meetings held and business transacted, shall receive all complaints 338 from parties wanting protection and relief and such as may require legal investigation. He shall submit the same to some attorney employed for the purpose by the executive committee and secretary. When a clear case of violation of law is found, he will call the executive committee and submit to it all the complaints and legal remedies, also all inquiries and complaints that may require counsel and advice, and communicate to the complainants the advice as suggested by the executive committee or occurring to the secretary.

Treasurer.—The treasurer shall receive all money from the secretary arising from entrance fees, annual assessments or any other source, and shall pay out the same on the order of the executive committee, countersigned by the secretary.

Executive Committee.—The executive committee shall meet at the call of the secretary at such time and place as shall be designated, and when assembled three members shall constitute a quorum to do business and admit and pass upon all bills that may come before the association. This committee shall investigate all complaints and examine the remedies suggested, and shall take such steps as in their judgment shall secure the best relief by laying the case before the proper authorities. The secretary of the club shall be the secretary of the committee, keeping a full record of all the business done by the same.

Meetings.—The club shall hold annual meetings on the second Tuesday in July of each year. Special meetings may be called by the president on the request of the executive committee and secretary.

339 **Membership.**—All persons owning mills or engaged in the manufacture of flour shall be eligible to membership and may become a member by signing the constitution and paying the sum of \$5.00 as an entrance fee.

Assessments.—Assessments shall be made by the executive committee and secretary to meet the current expenses of the club, and shall be levied on the members according to the capacity of the mill represented. All mills under 100 barrels capacity shall be assessed as 100-barrel mill, and all mills between a 100 and 200-barrel capacity shall be assessed as a 200-barrel mill, and so up to the highest capacity of our largest mills. Any member who shall fail to pay his or their assessment within thirty days of notification shall be notified a second time by registered letter, and if the amount is then not paid within thirty days, shall be dropped from the list of members and shall not be reinstated without paying all assessments due at the time of withdrawal.

Salaries.—All salaries shall be fixed by the club. The secretary shall receive his traveling expenses and such stated salary as may be fixed upon. The executive committee shall be allowed all traveling expenses including railroad fare and hotel bills. The salary of the secretary shall be fixed by the executive committee.

Rights.—Each member of a milling firm shall have a right to speak to any question on the floor, but only one member of a firm or company shall vote."

F. D. STEVENS:

I reside at Wichita, and have resided there about seven years. I am engaged in milling and milling business. I am not engaged in running a mill at Wichita, but am interested in one at Tonkawa, Oklahoma. (R., Vol. 3, p. 956.) The Southern Kansas Millers' Commercial Club was organized, I think, about seven years ago, by the Southern Kansas millers. We have about seventy members. I was the managing officer, at a salary of two thousand dollars a year and expenses, which was paid by the mill companies, by monthly or quarterly contributions. (R., Vol. 3, p. 957.) My duties were to look after the milling interests generally in Southwestern Kansas. C. V. Topping was secretary of the Oklahoma association. He met with our association quite frequently. F. D. Larabee was a member of the executive committee (R., Vol. 3, p. 958), I think, during the years 1906 and 1907. (R., Vol. 3, p. 959.) F. D. Larabee was admitted as a member because of his connection with the Larabee Flour Mills Company. They assisted monthly in paying my salary and expenses. I made the assessments. (R., Vol. 3, p. 960.) I would call on them from time to time for their assessments, by virtue of a previous agreement with them that I might draw on them. I sent out a flour market letter, giving the prevailing market conditions all over the country. (R., Vol. 3, p. 961.) This was sent out once a week to all members of the association, and to Mr. Topping, of the Oklahoma association, and to the Texas Millers' association. I still send out these market letters. There has not been one iota of change

in our program from the time we started, and I am still receiving the stated compensation and my expenses. (R., Vol. 3, p. 341 962.) My title is that of secretary of the Southern Kansas Millers' Association. I was a member and one of the incorporators of the American Grain & Flour Company. F. D. Larabee was one of the incorporators. The headquarters of that association are in the City of Wichita. Four or five thousand dollars of the capital stock was paid up. (R., Vol. 3, p. 963.) We sent out price lists from that association to all the millers in our association, and all the millers' associations in Oklahoma and Texas. (R., Vol. 3, p. 964.) Some of the stockholders of the American Grain & Flour Company were members of the association or club, and some of the members of the club were stockholders. The American Grain & Flour Company ran along up to 1907, and during that time Mr. Larabee was a member of it. (R., Vol. 3, p. 965.) I remember that the Larabees frequently objected to the millers cutting prices, and of their writing to me a letter in which they stated: "We have decided that the only thing for us to do to protect our trade is to go right after the price cutters, and do it up brown." (R., Vol. 3, p. 966.)

"Q. What did he mean in that letter, if you know, by 'price cutters'? A. Fellows who were selling flour at all kinds of cut prices." (R., Vol. 3, p. 967.)

"Q. What did he mean, if you know, by an expression of this kind: 'It is easy enough for some of the price cutters to step over and swipe some of our trade, and immediately hop back on the reservation, and say they will be good'? Now, what did he mean 342 by the 'reservation'? A. He means they were not telling the truth, I suppose." (R., Vol. 3, p. 968.)

The members of the club, or a great many of them, reported their sales, or their prices, or prevailing quotations, and prices they were selling at. (R., Vol. 3, p. 968.) I got the information from various people, and furnished it right back to them, and I was paid by all these people to do that. There were many complaints being made about cutting prices. Mr. Larabee made the complaint to me. I would immediately call the attention of the price cutter to the notice I had received. (R., Vol. 3, p. 969.) My business was to advise all the members of the association if any member was engaged in cutting prices. (R., Vol. 3, p. 970.) If I found out that any members of the association were cutting prices, if I felt like it, I would advise them as to the prices prevailing in that territory. (R., Vol. 3, p. 971.)

"Q. In one of these letters Mr. Larabee said: 'Our trade is practically wiped out in the state, and we have now decided we will make such quotations as are necessary to meet competition, and secure to our mill its fair and reasonable share of the local trade. I have no desire to take this step without first advising you, but, in case you hear that the Larabee mill is cutting prices, you will know the reason why. The Claflin mill is a disturbing element in some of our territory.' Now, do you know what Larabee meant by that?

A. Yes, sir.

Q. What?" (R., Vol. 3, pp. 972-3.)

343 Larabee was contributing to the support of this association. He was reporting the prevailing quotations as he was making and selling flour, and accepting the general reports that I was making as facts, and basing his quotations to a certain extent on the prevailing conditions as reported by me. He had come to the conclusion that the reports from my office were not reliable; that the other members were not reporting the true prices they were making, and therefore, he had decided that he would pay no further attention to us as to prevailing conditions, and sell flour without reference to any prevailing reports he might receive.

"Q. Now, what did he mean by saying: 'The Claflin mill is a disturbing element in some of our territory'?"

A. They were selling flour at a great deal less than the prevailing price.

Q. Less than the price you had advised Larabee was the prevailing price?

A. Yes, less than the price I had advised Larabee was the reported prevailing price.

Q. And when you got that protest from Larabee that the Claflin mill was a disturbing element, did you communicate with the Claflin Mill Company?

A. I don't think I did. The Claflin mills were never members, if I remember. (R., Vol. 3, p. 973-4.)

Q. Did you call them up by 'phone?

A. No. I don't think so.

Q. Will you say you didn't?

A. No. A man wouldn't be doing anything else if he
344 called up by 'phone every man that was making a price in the country." (R., Vol. 3, p. 974.)

I have always been a member of the Oklahoma association, and my expenses would be paid by members of the association here. (R., Vol. 3, p. 975.) I wrote a letter to Glen Walker, manager of the Millers' Insurance Company of Texas.

"Q. In that letter you speak about enclosing to him copy of minutes of the meeting held at Wichita, and you say 'Kansas, Oklahoma, Southern Missouri, forty-one mills, will adopt closing clause. I feel this is a movement in the right direction, and I trust Texas mills will join in the general movement'?"

A. Yes, sir; that was my business exactly.

Q. You was to get them in uniform operation?

A. Yes, get them terms.

Q. What do you mean by that?

A. Uniform terms throughout the country. Make it fair basis for mills to do business on.

Q. I notice minutes of meeting, which you signed as secretary, in which this language occurs: 'All of the 78 millers present, representing Kansas, Oklahoma, Missouri River and Arkansas, were favorable to the proposition; not one single speech was made against the proposition. Mr. Hunter then made the following motion: "I move that it is the sense of this meeting that the Kansas and Okla-

homa mills represented will, upon and after February 1st, 1904, quote all flour net cash, draft order, arrival draft attached to bill of lading"—the motion was seconded, and a rising vote was
345 taken. The motion was carried unanimously, everyone present voting.' You remember that meeting?

A. Yes, sir.

Q. You were present at the meeting, and recorded the minutes?

A. Yes, sir." (R., Vol. 3, pp. 976-977.)

"Q. In a letter that you wrote to Mr. Ed. K. Collett, Secretary, Fort Worth, Texas, you say: 'assure you you will have my best efforts in getting our mills to respect your flour prices in quoting flour in Texas.' What did you mean by that?

A. I mean just what I said, I suppose.

Q. What business did you have to fool with that?

A. I published his prices, his quotations that were sent up here.

Q. And you were making an effort to have the mills here respect those prices?

A. Yes, I published them, of course, that would be natural.

Q. And when you published a list of prices, was it your idea that the mills would respect that price?

A. Well, they could if they wanted to.

Q. That was the reason you published it, was it not?

A. We published it to give them the information.

Q. And you used your best efforts to have them respect it?

A. Have them respect it?

Q. Yes?

A. Well, naturally they could respect it if they wanted to. We tried to give them the most reliable information we could get, and they could respect it or let it go.

Q. You used your best efforts to have them respected, did you not?

A. I don't know. I did the best I could to give them prevailing prices.

346 Q. And you furnished them the prevailing prices?

A. I used my best efforts to give them the truth. What I was trying to do was to give them the facts as they were." (R., Vol. 3, p. 980.)

I gathered the information, and compiled a report of the prevailing prices, and sent that to all the millers once a week. This report would indicate the prices I had gathered from the market reports and from the mills all around. (R., Vol. 3, p. 981.) A "price cutter" is a fellow that is always selling, that is cutting everybody's price, wherever he finds them.

"Q. A member of this association who sold for less than the prevailing price you had furnished in your reports to them was a price cutter?

A. He was a price cutter if he sold for less prices, if he cut the other fellow's price, he was a price cutter.

Q. And he was so understood in the association as a price cutter?

A. That term wasn't very often used. (R., Vol. 3, p. 982.)

Q. But it was occasionally used, was it not, in your letters?

A. A less price, the price cutter would be a fellow who sold at a less price.

Q. You occasionally used it in your letters, did you not?

A. Not very often; I don't think I did. I don't know that I ever did.

Q. I see a letter here, apparently a circular letter, written by you, beginning: 'Gentlemen: With a view of making the bureau of information reliable, it is suggested that all mills report to their secretaries the prevailing wheat values in their respective local territories, said information to be furnished by the secretaries to the authorized purchasing agent, namely: the American Grain & Flour Company, representing the Kansas and Southwestern Missouri mills, the Oklahoma Export Company, representing the Oklahoma and Indian Territory mills, and the Texas Millers' Grain Association, representing the Texas mills.' Now, what do you mean in that letter by saying the American Grain & Flour Company represents the Kansas and Southwestern Missouri mills?

A. Well, they were buying wheat for them.

Q. Buying wheat for all the mills in that association?

A. No, sir.

Q. Well, for who?

A. For all that we allowed them to buy.

Q. Now, how was the American Grain & Flour Company paid?

A. Profit.

Q. For its service in buying grain for these mills?

A. Paid by profit." (R., Vol. 3, p. 983.)

Speaking of the American Grain & Flour Company, the following questions were asked:

"Q. In the letter it further states: 'It is further recommended that, where members of one club enter the territory of another club, they should respect the prevailing rules of the club in whose territory they may be working.' What did you mean by 'prevailing rules'?"

A. Well, in regard to the terms and whatever, for instance, they were practicing draft, bill of lading terms, in Texas. We wouldn't feel like going down there and giving them sixty or ninety days' time on flour.

Q. Anything about prices?

A. No, sir.

348 Q. That never was taken into consideration?

A. No, sir. (R., Vol. 3, p. 984.)

Q. It is further stated: 'The very existence of the milling industry of the southwest imperatively demands a careful consideration of the above recommendation by every mill. These people are in earnest. They came to Wichita instructed to demand of the Kansas mills fair business treatment. They are ready, willing and anxious to work with the Kansas mills for the general good of the milling industry of the southwest, and would regret to resort to retaliatory measures.' Will you please explain what you mean by that?

A. I mean just what I say.

Q. But I will ask you what you mean by 'these people are in earnest,' what people?

A. I don't know who you are referring to there. I didn't find out who.

Q. It is the Oklahoma and Texas mills?

A. That is who it refers to. Those are the people that were in earnest.

Q. What did you mean by saying that they came to Wichita to demand of the Kansas mills fair business treatment? What do you mean by 'fair business treatment'?

A. That is what they demanded.

Q. What do you understand they meant?

A. Fair business treatment, I suppose.

Q. In what respect?

A. In all respects.

Q. Prices and everything else?

A. There was probably what we might term a commercial war between two sections, you understand. (R., Vol. 3, p. 985.)

Q. In prices?

A. Not necessarily in prices.

Q. In everything, particularly prices?

A. Didn't necessarily include prices. I don't think a particular price, because they were getting the profits and selling flour, and putting it in consignments, and commissions, and selling on all kinds of time.

Q. And their purpose was to keep these Kansas mills out of that territory?

A. Not to keep us out.

Q. But if they went in there, it must be on the same terms and conditions that they handled the proposition?

A. They wanted to do business on business principles.

Q. In other words, there should be no competition down there with the Kansas mills?

A. No, sir; nothing of that kind; plenty of competition.

Q. But still they wanted fair business treatment?

A. Yes, sir.

Q. If they went down into Oklahoma and Texas, these Texas and Oklahoma mills wanted the flour put on the market down there on the same terms and conditions that they put the flour on the market?

A. Practically, yes, sir.

Q. What do you mean here: 'And would regret to resort to retaliatory measures'?

A. You understand that where conditions, the flour conditions on them down there, that wouldn't be very satisfactory. They were liable to come back up here. (R., Vol. 3, p. 986.)

Q. If they went down there and interfered with business conditions, they would come up here and interfere?

A. Yes, sir.

Q. And the purpose of that was to bring them in harmony?

A. Yes, sir.

Q. So that they wouldn't interfere with us on this business?

A. So that where they sold in their territory, it would be along the same lines, practically.

Q. Otherwise there would be retaliation?

A. Yes, sir.

Q. Now, in this letter, dated Wichita, Kansas, October 7th, 1905, you say: 'If you are dumping your surplus in the middle states and in the southwestern territory, disturbing your neighbors, it is suggested that your own interests demand that you discontinue same at once.' What do you mean by that?

A. There was always plenty of surplus flour to dump, you know, and I suppose, I don't know anything about that letter, don't know whether it is my letter or not.

Q. It is signed by you as secretary.

A. I suppose that middle states I am talking about there—

Q. (Interrupting.) You say, 'If you are dumping your surplus in the middle states, or in the southwestern territory, disturbing your neighbors, it is suggested that your own interests demand that you discontinue same at once?'

A. I will say that there is a certain amount of flour sold in what was called our home or local territory. There is always a very large surplus of flour that must be sold for export, or in some general markets outside of our home local territory. I
351 probably had reference to the mills forcing their surplus on to the middle states, and southwestern states, at prices very much under a profitable basis, and the suggestion was that they try and dump their surplus a little farther away from home. (R., Vol. 2, p. 987.)

Q. And thereby not disturb their neighbors in Oklahoma and Texas?

A. And thereby not disturb the milling industries in Texas and Oklahoma.

Q. You say in this: 'Your own interests demand that you discontinue same at once.' Now, did you not send this letter to all the millers in this Southwestern Kansas association?

A. I don't know whether I sent it out at all or not. I don't remember the letter. I don't know whether it was my letter or not. I don't know as I ever did get it out.

Q. Will you say you didn't?

A. I am not going to say I didn't; but I don't know whether I got it out or not.

Q. Assuming that you did write it, what did you mean by saying 'your own interest demands that you discontinue this disturbing condition'?

A. I meant, if I did write it, that the interest of every mill, the one particularly I was referring to at that time, would lead to demoralization, and absolutely paralyze the entire situation in this local territory and southwest. (R., Vol. 2, p. 988.)

Q. That is the idea that you had in view, to keep conditions normal in this southwest territory?

A. Yes, one part of my duty as secretary was to find markets for surplus productions, and try, if possible, to relieve the mills of their surplus products in order to keep from demoralizing.

Q. Demoralizing the trade?

A. Yes, sir.

Q. And in order to keep them from dumping this surplus in Texas and Oklahoma?

A. And middle states.

Q. You say in the concluding paragraph of the letter: 'If you find it impossible to sell your whole output at living prices, and are determined to keep your mill going full time, regardless of the cost, it is hoped that you will arrange to dump your surplus far enough away so that you will not continue to disturb your neighbors in their local territory?'

A. Yes, sir.

Q. That is what you meant, to keep conditions normal, and not bring about those conditions that would demoralize the trade?

A. And close the mills down, and paralyze them, and put them on a market at twenty-five per cent less, like they are in Texas today.

Q. And you further tried to bring about and pacify such conditions that there would be no antagonism between Texas and Oklahoma mills, and mills of Southern Kansas?

A. Yes; they were paying me for that, and finding markets in the world some place where they could dump the surplus product, and keep the mills going at a profit. (R., Vol. 3, p. 990.)

Q. I see in the postscript the following: 'From best advices, the supply of wheat in the farmers' hands in Kansas at the present time is equal to all requirements, including the wants of our more unfortunate neighbors in Texas and Oklahoma, and there is no reason why mills should force themselves to pay above the general market prices. All secretaries are requested to take this matter up with their members at once, so that the bureau will be in position to furnish the necessary information by the 15th of October.'

A. Yes, sir.

Q. What was the idea of that? What did you mean by 'unfortunate neighbors in Texas and Oklahoma'? Were they short?

A. Yes, they were short.

Q. Short of wheat?

A. Yes, and I was telling them we had plenty for ourselves, and all they required. (R., Vol. 3, p. 990.)

Q. The idea was to induce the mills, by persuasion, in your territory, not to pay the farmers above the market price for the wheat?

A. Not by persuasion, but by actual facts.

Q. Presented to them?

A. By disseminating the conditions, to keep them from paying high prices when there was sufficient wheat for all requirements.

As long as they knew that to be a fact, it isn't at all likely the mills would pay premiums for the wheat.

Q. Again it is stated here: 'Representatives of the Missouri River, Texas, Oklahoma and Indian Territory mills met in general conference with the Kansas millers at Wichita, Thursday, the 5th inst., with a view of arranging, if possible, a basis for closer co-operation. Our friends from the Lone Star State complained that some of the Kansas and Oklahoma mills showed no regard for values when selling their products in Texas.' This purports to be the minutes of a meeting, you understand?

A. I don't know. What date is that?

354 Q. October, 1905. Now, what do you mean by 'our friends from the Lone Star State complained that some of the Kansas and Oklahoma mills showed no regard for values when selling their products in Texas'? (R., Vol. 3, p. 991.)

A. I don't know how I could state it any plainer than right there.

Q. What business was it of yours?

A. I am giving them the information.

Q. You are telling the mills up here, by reason of the employment, that the mills down in Texas and Oklahoma were complaining?

A. Complaining the Kansas mills were showing no regard for values in offering flour in their states: yes, sir.

Q. In a letter dated October 11th, 1905, addressed to Mr. Ed. K. Collett, secretary, Fort Worth, Texas, you say: 'Your wire of even date has been forwarded to Kelley and Lysle, Leavenworth. They are members of the Missouri River club. In the future, take this up with Mr. R. E. Sterling, secretary, Missouri River Millers' Club, Kansas City. We hope to get our bureau of information working by the 15th. Some of the Texas mills are bidding very high prices yet, but I hope that we will soon get things lined up. We will be all right at this end, and if you will advise me names of all the mills cutting prices on flour, I will go after them.' What did you mean by that?

A. I don't remember that letter at all.

Q. If you wrote that letter, what did you mean by that?

A. I don't know whether I wrote it or not.

355 Q. Will you say you didn't?

A. No, I will not say I didn't." (R., Vol. 3, p. 992.)

The attention of the witness was here called to a letter (R., Vol. 3, p. 996), dated October 21st, 1905, on the letterhead of the American Grain & Flour Company, addressed to Mr. Ed. K. Collett, Fort Worth, Texas, in which, among other things, it is stated:

"GENTLEMEN: At the last joint meeting of millers from Kansas, Southwest Missouri, Oklahoma and Texas, it was recommended that, owing to the conditions then governing the value of wheat, it was necessary that something be done at once to stop further demoralization of these values. * * * Through this arrangement, it is hoped to regulate the value of wheat with the value of flour. We wish to say that it will be absolutely necessary for each and every

mill interested in this movement to give it their unanimous support. * * * The Texas mills and their brother members in Oklahoma have expressed their willingness to stand firm on this proposition, and we should see no further demoralization of the wheat values in Kansas and Oklahoma. * * * We wish to say that, in the start of this movement, owing to the light receipts of wheat, mills may become impatient, but, if they will have patience, and place their orders with us, we think we will alleviate competition at country points through the wheat belt. We do not think it is to the interest of any mill to bid any dealers, regardless of whether they are located at grain centers or country stations, out of line value. If mills do this direct, it is as bad as the brokers. In case it is necessary for mills to have wheat, you should let one agent do the purchasing, at whatever price it is necessary to secure 356 the wheat. It may be necessary at times to put a high value on wheat to hold it, if mills are compelled to have wheat at once, but the object of this arrangement is to keep the value of wheat in line with other markets. This is a movement in the right direction on the part of the different millers' organizations, for the success of their interests, and should have the undivided and hearty support of all." (R., Vol. 3, pp. 996-7-8.)

This letter is signed by the American Grain & Flour Company (R., Vol. 3, p. 999), and the following postscript is added to the same:

"We are just in receipt of a 'phone message from Mr. F. D. Stevens, who has been attending a joint meeting of the Oklahoma and Texas millers at Oklahoma City, stating that it was one of the strongest millers' meetings he ever attended, and it was an absolute stand-pat meeting on the present arrangement."

"Q. Is it not a fact that you knew there was an implied arrangement between you, or you as secretary or manager of the Southern Kansas Commercial Club, and Oklahoma and Texas, to prevent a demoralization of business?

A. To the extent, yes; to prevent the demoralization of business.

Q. And that continued and does continue right down to date? (R., Vol. 3, p. 999.)

A. That is what I am for exactly, to find a market for surplus products, and, of course, to relieve, you understand, the district here."

I used the words "price makers" because it is a very common expression, speaking of competition, a mill that is always making 357 very low prices, they are referred to as price makers.

They set the prices, things of that kind. (R., Vol. 3, p. 1003.)

Speaking of the circulars sent out by the witness Stevens each week, and the one sent out in August, 1906 (R., Vol. 3, p. 1005), the following questions were asked:

"Q. Now, at the time you sent that in August, 1906, and down to the date of the injunction at Hutchinson in 1909, you occupied the same relation to this association that you did previous to August, 1906, secretary and manager, or secretary?

A. Yes.

Q. And the same compensation?

A. Yes, sir; different membership, of course, from time to time.

Q. But the amount of your compensation never was changed?

A. Never was changed.

Q. And that was contributed by virtue of assessments made by you?

A. Yes, sir.

Q. And sent out to the mills, including the Larabee Mill Company?

A. Yes, sir. (R., Vol. 3, p. 1005.)

Q. And it was uniformly paid?

A. Yes, those that didn't pay it wasn't in good standing.

Q. You were acting as the agent and representative of this association, for the purpose for which you have indicated in your testimony?

A. And others, yes, sir. We did a great deal more than what you have gotten in here." (R., Vol. 3, p. 1006.)

(Witness was here handed "Exhibit C-1.") (R., Vol. 3, pp. 1006-7.)

358 "Q. I notice in this statement, which you admit you sent: 'prices in Kansas during the past week seem to have been well maintained.'

A. Yes, sir. (R., Vol. 3, p. 1007.)

Q. Maintained by whom?

A. By the mills.

Q. What business was that of yours?

A. That is practically what they are paying me for, to report the conditions." (R., Vol. 3, p. 1008.)

"Q. You say: 'In quite a number of cases the prices named would hardly cover the actual cost of the raw material used, and I would suggest that millers making these quotations shut down their mills long enough to figure out the actual cost of making flour.' Was that sent to all these mills?

A. Yes, sir.

Q. Why was you suggesting they shut down their mills?

A. It tells right in there.

Q. Did you conceive that to be a part of your duty?

A. I will state this much: it isn't always practical, I make suggestions, but that suggestion is merely made to call the attention to the cost of making flour.

Q. Did they frequently carry out your suggestions?

A. Not in shutting down the mills." (R., Vol. 3, p. 1008.)

Relative mills making prices lower than the prevailing prices, furnished by the witness, F. D. Stevens, the following questions were asked:

"Q. And it was to those you made the suggestion of shutting down their mills, to figure up the cost of manufacture?

A. Yes, sir.

359 Q. You say further: 'Don't estimate your cost for one day, week or month. Take your total expense for the last year, and divide by actual number of barrels you made, not by your capacity or what you might have made if you had run full time. If you have never done this, you will be surprised to find out how much it costs you to make flour.' Are you an expert miller? R., Vol. 3, p. 1009.)

A. I am not an operating miller at all.

Q. Did you ever operate a mill?

A. I handled the business end.

Q. Do you know anything about the machinery?

A. Yes, sir.

Q. Are you what would be called an expert miller?

A. Not to manufacture the flour, no, sir.

Q. Didn't you think it was somewhat presumptuous on your part to give advice of this kind to the mills of this association when you were only employed for the purpose of collecting information for them?

A. Possibly a little.

Q. You say further: 'The Millers' National Federation, at its Milwaukee meeting last month, found the actual cost of manufacture of a barrel of flour to be 45 cents, to which you must add the cost of packages. Don't figure less. Always use the Federation Packers Differentials. Compare your prices with quotations being made by the standard mills, as indicated by the enclosed. Yours truly, F. D. Stevens.' 'Send in weekly reports promptly.' Now, then you, not being an expert miller, were telling these expert millers, Larabee and others, what it would cost them to manufacture a barrel of flour,

360 and you conceived that to be a part of your duty?

A. Probably I went a little too far in that.

Q. Now, Mr. Stevens, isn't it a fact that circular was intended by you as a gentle admonition to these mills who were cutting these prices, to shut down for a while? (R., Vol. 3, p. 1010.)

A. Not exactly, no. It was, I wanted to show them they were making too low prices.

Q. And they better shut down for a while, until market conditions changed?

A. I don't think that was the intention. In fact, I know it wasn't the intention. The idea was, a great many mills figure the cost from day to day, or week to week, based on full time run, and it makes a great difference in the cost of flour whether they are operating the mills 24 hours or 12 hours, and they are not all expert millers in the southwest. While Larabee and some of them knew what it would cost to make flour on 12 hours' run, there were a great many millers, and are today, who don't know what it costs to make flour on 12 hours' time.

Q. Do you consider it cost more to make flour in 12 hours run than 24 hours run?

A. Yes.

Q. What per cent?

A. Sixty per cent.

Q. For that reason you advised the mills who were cutting prices to shut down until the market——

A. (Interrupting.) I didn't say cutting prices.

Q. Hold their trade in Kansas and Southwest Missouri at \$1.90 basis?

A. Yes, that is in Kansas and Oklahoma.

Q. And are very irregular, varying from 20 to 50 cents a barrel; and you advised them to shut down their mills to figure on expense?

A. I suggested these mills making this price better shut down, and figure where they are at." (R., Vol. 3, p. 1011.)

Q. I understood you to say this morning that you had not changed your manner of doing business as secretary and manager of this Southern Kansas Millers' Club from the date of its organization down to the present date?

A. As far as the Club is concerned.

Q. And all you did was acting as the agent and representative of these mills, who paid you your salary and expenses; I mean you acted as manager of that association?

A. Of course I had some other business.

Q. Yes, but in connection with that?

A. Yes, I looked after the business of the Southern Kansas Millers' Association.

Q. In other words, these men would contribute to your salary, and expenses, and recognize you as acting for them in looking after this general situation?

A. Certainly.

Q. As manager and secretary of this association?

A. Yes, sir." (R., Vol. 3, pp. 1018-1019.)

F. D. Larabee was present at the meeting of the club May 10th, 1906.

Q. I notice the record states as representing the Larabee Flour Mills?

A. Yes, sir.

Q. He was so recorded?

A. Yes, sir; I think so."

The Larabees contributed to the fund. (R., Vol. 3, p. 1020.)

362 Q. F. D. Larabee represented the flour mills, did he not?

A. That is my understanding.

Q. And those drafts were made against the Larabee Flour Mills Company, were they not?

A. I am not certain as to that, either. F. D. Larabee or the Larabee Flour Mills Company.

Q. He was a member by virtue of the fact that he was running that mill at Stafford?

A. Certainly. He wouldn't care to be a member unless he was in the milling business.

Q. I notice here assessments collected for months of May, June, July, August, September and October, 1906, Larabee Flour Mills Company, \$130.00; is that correct?

A. I think so.

Q. That was collected from the Larabee Flour Mills Company?

A. I suppose it was.

Q. These are records kept by you?

A. Yes, sir; or by my stenographer, under my direction.

Q. That was for the months of May, June, July, August, September and October, \$130.00. What period of time did that cover, any except these months in 1906?

A. I think not. Ain't the separate months given there? How many months?

Q. May, June, July, August, September and October, 1906?

A. That was six months.

Q. Yes, six months.

A. \$130.00? (R., Vol. 3, p. 1021.)

Q. Yes.

A. I don't recall what the basis was." (R., Vol. 3, p. 1022.)

Record, Vol. 3, pages 1023, 1024 and 1025 give the names of millers, and amount contributed by each. The letter from
363 Larabee, of date July 2nd, 1906, to F. D. Stevens, Wichita, Kansas, among other things, states:

"It strikes us that conditions are about as bad as can be, and just at the beginning of new wheat we think it would be advisable to get the scrappers together. Yours truly, The Larabee Flour Mills Company, F. D. Larabee."

By that Larabee meant that "they were scrapping in competition with each other all over the country." (R., Vol. 3, p. 1028.)

The letter of date September 26th, 1906, from the Larabee Flour Mills Company to F. D. Stevens was identified, in which it is stated:

"We are sure that milling wheat is going to be mighty hard to get, and we don't care to book a long line of stuff at present quotations." (R., Vol. 3, p. 1030.)

After Larabee wrote the letter threatening to "get off the reservation" unless price cutting was stopped, the matter was fixed up. At least they continued to pay their monthly assessments. (R., Vol. 3, p. 1032.)

I met with the Oklahoma millers quite frequently. I was a member of the Oklahoma association, and paid dues there. (R., Vol. 3, 1033.) Some controversy arose between the associations. Some of the mills notified me that they were going into the net cash draft with bill of lading service.

"Q. And your effort in writing this letter (addressed to Fred P. Nott, Massena, Iowa, dated August 1st, 1906), was to prevent
364 this competition and controversy?

A. Yes, sir; just as it come." (R., Vol. 3, p. 1034.)

Some of the members of the association made complaints, and asked that their names be taken off the lists.

"Q. Do you understand when they quit paying they got off the reservation?

A. I guess so." (R., Vol. 3, p. 1035.)

The witness sent out a circular, marked "Exhibit 12," dated at Wichita, Kansas, January 2nd, 1907, in which he calls attention to

the fact that "the car situation grows no better fast," and, in effect, advising a friendly conference over the disturbed conditions. (R., Vol. 3, p. 1048.)

On November 24th, 1906, a circular was sent out by the witness, "Exhibit C-13," in which it is stated:

"Several mills report closed down for want of coal. Many have been down on account of car shortage. The Santa Fe issued general notice today that empty cars would only be furnished for perishable freight. The Missouri Pacific will furnish cars to load for points on their own rails only, when they have them. The Rock Island and Frisco have ordered all empty box cars to coal mines for company coal.

The situation is the worst ever known, and no relief in sight." (R., Vol. 3, p. 1050.)

Q. Another circular, December 3rd, 1906, in which you state: "The car situation is not improved any. Many mills down 365 on account of failure to get cars. The railroads have promised relief in a few days." That was correct?

A. Yes, sir.

Q. If the Larabee Mills was closed down the 1st, 2nd, 3rd, 4th and 5th about that time, it was on account of conditions of this kind?

A. Might be. I think that was the situation." (R., Vol. 3, p. 1051.)

On December 8th, 1906, another circular was issued, stating:

"No material change in the car situation." (R., Vol. 3, p. 1051.)

In this connection, attention is called to the letter of C. V. Topping, secretary, of date May 16th, marked "Exhibit 15" (R., Vol. 3, pp. 1053-1054), showing a combination to prevent the farmers from getting increased price for wheat. The letter, dated December 6th, 1906, marked "Exhibit 16," from the Larabee Company to F. D. Stevens, among other things states (R., Vol. 3, pp. 1054-1055):

"We note that milling conditions have improved somewhat. We are not finding much demoralization in our territory."

The letter of date December 1st, 1906, from the Larabee Company to F. D. Stevens, states ("Exhibit C-17"):

"We will attend the meeting which you mention in your letter of November 26th. Would suggest that the meeting be held around 366 about the 11th or 12th." (R., Vol. 3, p. 1055.)

The letter of date October 10th, 1906, from the Larabee Company to F. D. Stevens, Wichita, Kansas, "Exhibit C-18," states:

"In reply to yours of the 9th, in case you have a meeting in Hutchinson Tuesday we will be represented." (R., Vol. 3, p. 1056.)

The letter of date October 16th, 1906, from the Larabee Company to F. D. Stevens, "Exhibit C-19," states:

"The milling situation certainly does not look very encouraging. I know of several of the smaller mills that are not making half time, and we must all admit that markets are very dull. Our own trade take very little interest in quotations. They are not stocked up, and still they seem to have the idea that markets are going all to

smash, and they will buy next to nothing if they wait long enough." (R., Vol. 3, p. 1057.)

(This letter was identified by the witness.)

The letter of date August 14th, 1906, addressed to Mr. F. D. Larabee by F. D. Stevens (R., Vol. 3, p. 1059), was identified by the witness, in which it is stated that:

"You no doubt have received notice that standard mills throughout the state have made a general reduction on flour to a basis of \$1.80 for high patent. I trust that it may not be necessary to make a further reduction."

The letter of date June 8th, 1906, addressed to the Larabee 367 Flour Mills Company and the Kingman Milling Company, "Exhibit C-22" (R., Vol. 3, p. 1060), states:

"Replying to yours of the 5th, beg to advise that our Mr. Rucker returned this afternoon from a trip on the Englewood Branch, and reports that the prevailing price quoted dealers by the Kingman and Stafford mills is \$1.80. Kindly return this letter, with such statement as you may see proper to make."

(The quotation is from a letter received by F. D. Stevens from Nessley & Rucker, of date June 6th, 1906.)

"Q. Did you, as manager and secretary of your association here, frequently attend the meeting in Oklahoma?

A. Quite often, yes, sir." (R., Vol. 3, p. 1063.)

A letter received by F. D. Stevens in November, 1906, from C. V. Topping, secretary, states, in substance:

"Mills all over the country have been running upon the home trade until it has become overstocked. Our wheat prices are out of line for export, and the only solution for us — to curtail our output, shut down our mills to half time or more, if necessary. I am in receipt of letters from different parts of the country in which they state the mills are closing down rather than force the markets, and accept lower prices and demoralize the trade. * * * Don't make any more flour than your home trade requires. Shut down your mill rather than fill your warehouses with flour. * * * So, under the present existing circumstances, there is nothing left for us to do but to curtail the output of our mills, and hold our prices firm." (R., Vol. 3, p. 1065.)

368 The witness, Stevens, being asked if he remembered that circular stated:

"A. I don't remember, but it sounds natural.

Q. You wouldn't say you didn't receive it?

A. No, sir.

Q. That was the kind of a circular you exchanged pro and con, I mean the substance of it?

A. Yes, that is the conditions he was giving them generally as he found it.

Q. And that is the kind of conditions you would give to your people?

A. Very likely give them the conditions, whatever they were." (R., Vol. 3, p. 1066.)

"Q. And you would advise Topping, as secretary of that association, of the conditions here, and he would advise you of the conditions there?

A. Yes, sir.

Q. And that was a part of your business as manager and secretary of the Southern Kansas Millers' Commercial Club?

A. Yes. I say that that was my business to send the stuff out in regard to the milling situation, the market." (R., Vol. 3, p. 1066.)

A letter written by Mr. Topping on December 6th, 1905, states (R., Vol. 3, pp. 1066-1067):

"The mills all over the territory and Southern Kansas advised me that they are holding strictly for the \$2.20 price; that their goods are worth this money, on the present wheat market, and that they will not sell for less, as their terms are strictly cash. It simply remains for us to stand firm, and refuse to accept business at 369 less than the regular market price; and, as it is only a week until our meeting, I certainly wish that every one would refuse to take less than the regular market price for your goods. Stand strictly by your declaration, etc."

In a letter from Mr. Topping, dated February 5th, 1906 (R., Vol. 3, p. 1067), addressed to Mr. Stevens, he says, among other things:

"The writer, together with a few of the Northern Oklahoma millers, attended a meeting of the Kansas millers at Hutchinson, Kansas, on January 30th, and we are pleased to report that this was one of the best meetings that Kansas ever held. There seems to be a better spirit existing, and a more harmonious feeling than ever before, and they adopted the same plan as the Oklahoma millers are working under, and I am confident that we will not have any more of the competition that has existed in the past. Regardless of what anyone else does, they are going to stand pat, and meet again in thirty days, with a clean record. We have called a meeting for next week at Wellington, Emporia and Topeka, Kansas, and Joplin, Missouri, to get the millers in these sections working harmoniously with us." (R., Vol. 3, p. 1068.)

I have seen Mr. Topping at Wichita at our meetings quite often. He used to meet there with our club quite frequently. (R., Vol. 3, p. 1070.)

(The letter of Ed. K. Collert, secretary of the Texas Association, addressed to F. D. Stevens, of date November 28th, 1904, shows that these two people were members of a conspiracy to violate the 370 law.) (R., Vol. 3, pp. 1072-73.) The letter of Moses Brothers M. & E. Company, of Great Bend, addressed to the witness Stevens discloses the same combination. (R., Vol. 3, p. 1074.)

In the letter of Moses Brothers to F. D. Stevens, dated December 26th, among other things it is stated:

"We regret very much indeed that things have come to such a state of affairs as they are now, but we cannot help but say Mr. Larabee's letter quotes our sentiments exactly." (R., Vol. 3, p. 1077.)

The witness states: "I think that is the one you and the Attorney

General have been harping on for two years." The witness evades the question as to what the Larabees meant in their letter to him: "What we want is some assurance that these people will be good all the time, and, until we feel satisfied that such will be the case, we are not going to be good ourselves." (R., Vol. 3, p. 1079.) And also statement about using "retaliatory measures" against price cutters; but finally was forced to admit that the "retaliatory measures" referred to by the Larabees meant that they were going to sell their product regardless of cost. (R., Vol. 3, p. 1081.)

On December 29th, 1904, F. D. Stevens sent out a circular, among other things, stating:

"You will, no doubt, be surprised to learn that a few irregular, irresponsible mills are in a great measure responsible for the present conditions. * * * The lack of independence, confidence and good faith on the part of a few of our larger responsible mills, with their weak-kneed, unreliable traveling salesmen, together with very dull domestic trade during the past sixty days, with no chance to export surplus, has been more than the average miller could stand." (R., Vol. 3, pp. 1082-3.)

Mr. F. D. Stevens identifies a letter written by himself on September 25th, 1905, to Mr. Ed. K. Collett, as follows:

"DEAR SIR: The enclosed correspondence from Mr. Topping is self-explanatory. I have arranged for a general meeting of our club at the Carey Hotel, Wichita, October 5th, and we will be pleased to have a committee representing Texas and Oklahoma mill- meet with us at this time. I have written Mr. Topping; also Mr. Whaley, of Gainesville, Texas; Mr. Kell, of Wichita Falls, Texas; Mr. Morrow, of Houston, Texas; Mr. Neal, of Dallas; and Mr. Nolte, of Sabine. * * *

I have no doubt but what much good can be accomplished at a meeting of this kind. I assure you that you will have my best efforts in getting our mills to respect your flour prices in quoting flour in Texas. Yours truly, F. D. Stevens." (R., Vol. 3, pp. 1084-1085.)

There has been a war between the Kansas, Oklahoma and Texas millers from the time that I can remember.

"Q. And your purpose was to stop that war, if possible?

372 A. The idea was to get as near correct information as we could, so that they would sell flour as near the market value as possible.

Q. 'I assure you you will have my best efforts in getting our mills to respect your flour prices in quoting flour in Texas?'

A. Yes, sir.

Q. You endeavored to do that, didn't you?

A. I tried to publish correct information." (R., Vol. 3, p. 1085.)

Referring to the letter presented to witness, of date October 7th, 1905 (R., Vol. 3, p. 1086), in which it is stated, among other things, that: "It is further recommended that, where members of one club enter the territory of another club, they should respect the prevailing rules of the club in whose territory they may be working,"

witness first denied having written the same, but finally would not say he did not write it, and admitted that: "I may have written the letter."

The witness admitted, on October 11th, 1905, addressing a letter to Mr. Ed. K. Collett, secretary, Fort Worth, Texas (R., Vol. 3, pp. 1087-1088), in which, among other things, he stated:

"Some of the Texas mills are bidding very high prices yet, but I hope that we will soon get things lined up. We will be all right at this end, and if you will advise me names of all the mills cutting prices on flour, I will go after them. I am very busy. Yours truly, F. D. Stevens."

"Q. You admit writing that letter?

A. I believe I wrote that letter; I don't know.

373 Q. That was a letter sent to Mr. Collett, who was then secretary of the Texas Millers' Association, was it not?

A. I suppose so." (R., Vol. 3, p. 1088.)

C. W. Binkley was employed by the American Grain & Flour Company. He was under my jurisdiction and control. (R., Vol. 3, p. 1088.)

"Q. And he had authority to represent the American Grain & Flour Company, which was the authorized agent of the Southern Kansas Commercial Club, is it not?

A. Well, I don't know. I notice in some of that correspondence it says the authorized agent.

Q. Isn't that a fact?

A. For the club?

Q. For some of the members of the club?

A. Some of them it bought wheat for, yes, sir." (R., Vol. 3, p. 1089.)

F. D. Stevens attended a meeting on February 15th, 1905, at Oklahoma, and in the minutes of the meeting it is shown that: "It was moved and carried that the mills shut down six days within the next thirty days, provided that Texas mills join in the shut-down" (R., Vol. 3, p. 1090), and that Mr. F. D. Stevens, as secretary and manager, circulated the proceedings of that meeting to the members of the club. (R., Vol. 3, p. 1091.)

A letter was introduced, dated November 15th, 1905, signed by Mr. C. V. Topping, with a notice attached to it from F. D. Stevens, together with letter of Mr. Stevens, dated November 15, Exhibit "C-23." (R., Vol. 3, pp. 1091, 1092, 1093, 1094, 1095.)

374 Witness identified the circular dated February 1st, 1906 (R., Vol. 3, pp. 1096-97), in which he admits that the prices quoted by the American Grain & Flour Company are the prevailing prices in the respective territories named.

"Q. At the time you were sending out these letters you were fixing the prices, fixing the quotations for the American Grain & Flour Company, and the American Grain & Flour Company furnished it to you, as manager of the Association, and you furnished it to the club?

A. Of course, you might say it in that way if you want to, but

is a matter of fact, the American Grain & Flour Company was buying and selling flour." (R., Vol. 3, pp. 1098-1099.)

"Q. I find a letter here, Noember 6th, 1905, F. D. Stevens, Wichita, Kansas. 'Dear Sir: The Aetna Milling & Elevator Company of Wellington, Kansas, has made quotations at Bridgeport, Texas, of 2.30 per hundred, which, as you know, at the present time is about 20 cents under our quotation generally made in our state. I wish you would please do what you can to keep these people in line. Yours very truly, The Texas Millers' Association, Ed K. Collett, Secretary.' To which you replied: 'Southern Kansas Millers' Commercial Club, F. D. Stevens, Manager, Wichita, Kansas. November 11th, 1905. Mr. Ed K. Collett, Secretary, Fort Worth, Texas. Dear Sir: I have your favor of the 6th, with reference to the prices made by the Aetna Milling Company of Wellington. The same has been referred to Mr. Hackney, manager of the Aetna Milling Company, with the request that he advance his price in Texas. Yours truly, F. D. Stevens.' By what right or authority did you make that request?"

A. I had none whatever." (R., Vol. 3, pp. 1104-1105.)

"Q. I see another letter, Wichita, Kansas, November 14th, 1905, Mr. Ed K. Collett, Fort Worth, Texas. 'Note and return enclosed letter from the Aetna Milling Company, Wellington. I trust they will advance prices in Texas so as not to disturb conditions. Yours truly, F. D. Stevens,' and in which was included copy of letter from the Aetna Mill & Elevator Company, signed by Mr. Hackney, dated November 13th, 1905, in which he says: 'Wellington, Kansas, November 13th, 1905. Mr. F. D. Stevens, Wichita, Kansas. Dear Sir: We are in receipt of yours, with enclosure from the Texas Millers' Association, and in reply will say that we quoted flour a little bit cheap down at Bridgeport, Texas, and sold a car. At the same time we got the same price we are getting throughout Texas, and we have a representative in Texas, and a man we think we can rely on, and he informs us that he is getting the prices made by the Texas mills.'

Now, we are not taking on any new customers—that is, we have not sold any flour to any new customers—only the same people we have been selling to ever since we have been here, and we will be only too glad to advance the price, and, in fact, have advanced it within the last thirty days considerable. One reason that we did not get the Association price, or what they claim to be the Association price, is that we did not know what it was, but we have a letter from Collett stating that he will keep us informed as to the price, and we will endeavor to stay in line.' * * * Did you send that down there?"

A. Yes, sir, I sent it down there." (R., Vol. 3, pp. 1105-6-7.)

"Q. I find another letter, dated November 27th, 1905, addressed to you, signed by Mr. Collett, as follows: 'Mr. F. D. Stevens, Secretary, Wichita, Kansas. Dear Sir: Information has just reached me that the Baden Mills of Winfield, Kansas, are offering high patent flour at San Antonio at \$4.60, while the present Texas quotations in that group should be \$4.80. The Abilene Milling Company of

Abilene, Kansas, is also quoted as offering their highest patent at \$4.65, and high patent at \$4.55, and making no difference for 98s. I wish you would please take this up with them and see if you cannot get them in line. Yours very truly, The Texas Millers' Association, per Ed K. Collett, Secretary.' What is meant by the use of the word 'group'?

A. The freight rates they used down there.

Q. It had no reference to grain rates or flour rates?

A. No; freight rates; flour is worth a little more where the rate is a little higher." (R., Vol. 3, pp. 1107-1108.)

An examination of the following letter will show that it had reference solely to the price of flour, and did not mean freight rates—had no reference to freight rates.

"Q.-I find this letter from the Southern Kansas Millers' Club: 'F. D. Stevens, Manager, December 4th, 1905. Mr.

Ed K. Collett, Fort Worth, Texas. Dear Sir: Referring to your favor of the 27th, with reference to prices made by the Baden and Abilene mills, I have written the Baden mills with reference to this matter. The Abilene mills, however, are members of the Northern Club. I have forwarded your letter to Mr. Bradley, secretary. I regret to advise you that the Texas Star and other Texas mills have been buying wheat in our territory at from 1 to 3 cents above the prevailing prices. I am also advised by a number of our larger mills that unless the Texas mills respect local conditions in buying wheat in this territory that they will retaliate with very low price on flour in Texas. You will understand that we have not been able to move our surplus flour to the general markets, and we have a large amount of surplus flour on hand at this time that we would be very glad indeed to dispose of at cost. * * *

I wish you would take this matter up with your executive committee and advise me at your earliest convenience if your people would be willing to meet with the St. Louis, Missouri River, Southwestern Missouri, Oklahoma, Kansas and Southern Nebraska millers in general conference at Kansas City.

I have addressed a similar letter to secretaries of all clubs in the Southwest. I believe that it is very important that we get together at any early date. Yours truly, F. D. Stevens.' (R., Vol. 3, pp. 1108, 1109, 1110.) You remember sending such a letter?

A. I don't remember. It is a good while ago. I suppose I wrote it." (R., Vol. 3, p. 1111.)

378 I am still meeting with the association in Oklahoma. I meet with them three or four times a year.

"Q. You say in this letter: 'It has been suggested that if all the Southwestern mills will withdraw from the market for ten or fifteen days that we will be able to accomplish some good.' What do you mean by that?

A. I expect some of these mills wrote me that, and I was trying to earn my money sending it out to them." (R., Vol. 3, p. 1113.)

They probably suggested that it might be a good idea to wait until the railroads could move this stuff.

"Q. And then shut down and lower the price of wheat?

A. Yes, sir.

Q. So you advised the Texas Millers' Association that was a probability, unless they kept out of this territory with high prices?

A. Yes; probably these mills would go down there with their flour and paralyze the market." (R., Vol. 3, p. 1114.)

"Q. What is meant by 'When such a story comes to him, to ask the accused miller directly and fairly'—what is meant by the 'accused Miller'?

A. You may say, the Larabee Mills make a price to their customers, and their customer calls him up on the telephone, or tells his traveling man that he was offered flour by the Kansas Mills Company of Wichita at 10 or 15 cents less.

Q. And the Kansas Milling Company of Wichita, in that case, would be the accused miller?

A. Yes, he would be the accused miller." (R., Vol. 3, p. 1115.)

(See charter of the American Grain & Flour Company, Vol. 3, pp. 1118-1121, in which F. D. Larabee was a stockholder and F. D. Stevens was one of the incorporators.)

The evidence of the witness F. D. Stevens shows that he was the agent of the Larabee Company, as well as the managing officer of the Millers' Association, and that the intent and purpose of the association was to control the prices of wheat and grain and mill products.

C. W. Binkley.

I reside at Wichita, Kansas. Am in the grain business for a company. I was an employé of the American Grain & Flour Company from June, 1905, until, I think, in August, 1906. The general manager of that company was F. D. Stevens. I was assistant manager during that time. (R., Vol. 3, p. 1134.)

Letter was offered in evidence dated October 17th, 1905, addressed to Glen Walker, Fort Worth, Texas, signed by the American Grain & Flour Company. (R., Vol. 3, pp. 1135-1136.)

Also the letter written by witness on the 21st day of October, 1905, to Ed K. Collett, Exhibit "C-32" (R., Vol. 3, p. 1138), advising of the establishment of an association for the purpose of stopping "further demoralization of these values," and stating: "This bureau of information will work in close connection with the other agencies, establishing a maximum value of wheat each day, and giving this desired information to all its members."

380 "The Texas mills and their brother members in Oklahoma have expressed their willingness to stand firm on this proposition, and we should see no further demoralization of the wheat values in Kansas and Oklahoma. * * *

In case it is necessary for mills to have wheat, you should let one agent do the purchasing at whatever price it is necessary to secure the wheat. It may be necessary at times to put a high value on wheat to move it, if mills are compelled to have wheat at once, but the object of this arrangement is to keep the value of wheat in line with other markets." (R., Vol. 3, p. 1140.)

To which letter is a postscript stating:

"We are just in receipt of a 'phone message from Mr. F. D. Stevens, who has been attending a joint meeting of the Oklahoma and Texas millers, at Oklahoma City, stating that it was one of the strongest millers' meetings he ever attended, and it was an absolute stand-pat meeting on the present arrangements." (R., Vol. 3, p. 1141.)

Mr. Ed K. Collett, I think, is secretary of the Texas Millers' Association. This witness here testifies to a state of facts which conclusively establishes the proposition that there was not only a combination among the Kansas millers but a combination between the Kansas, Oklahoma and Texas Millers. (R., Vol. 3, pp. 1142-1151.)

Mr. Larabee was a member of the American Grain & Flour Company, and also of the Southern Kansas Millers' Commercial Club—the Larabee Flour Mills Company. (R., Vol. 3, pp. 1148-1149.) Mr. Larabee was present at the meetings. (See letter dated November 24th, 1905, written by the witness to Mr. Ed K. Collett, R., Vol. 3, pp. 1149-1150.)

A suit was brought in the name of the State of Kansas on the relation of Fred S. Jackson, Attorney General, in the District Court of Shawnee County, Kansas, against all the mills in the Southern Kansas Commercial Club, including F. D. Larabee, in which it was alleged, generally, that the said Southern Kansas Millers' Commercial Club was an unlawful organization, designed to further and promote certain unlawful arrangements and combination, which the defendant made and established and directed as therein alleged, for the purpose of controlling the price of flour, bran, shorts, meal and chops, and said unlawful arrangements and combination between the defendants was designed to advance, reduce and control the price of flour, bran, meal, shorts, chop and mill products. F. D. Stevens was a party defendant in said action. The same was filed in March, 1907, and covered a period of time for more than one year previous thereto. On the 4th day of March, 1907, a temporary injunction was granted (R., Vol. 3, p. 1168), and on the 2d day of December, 1908, said action came on for trial, and said F. D. Stevens and F. D. Larabee were present in person or by attorney. (R., Vol. 3, p. 1206.) On said date the said court made and entered its judgment therein, which provided that (R., Vol. 3, p. 1208):

"It is therefore considered, ordered and adjudged and decreed by the court that the defendants be and they are hereby perpetually restrained and enjoined from regulating, fixing, determining or maintaining, by agreement or understanding of two or more of the defendants, the price of wheat, flour, bran, shorts, meal and chops, and from fixing a uniform price for such articles; but the defendants, The Southern Kansas Millers' Commercial Club and The Southwestern Bureau of Information, may preserve their organizations so long as the said organizations are not hurtful or detrimental to free competition in the trade and commerce of wheat, flour, bran, shorts, meal and chop within the State of Kansas. And it is further adjudged that defendants pay the costs of this action."

F. S. Larabee.

"Q. Do you know an association called the Southern Kansas Millers' Association?

A. Well, now, Mr. Waggener, I know there is an association of millers, but whether that is the correct name or not I couldn't tell you.

Q. You are a member of that association?

A. Our milling firm was a member of that association—whatever its name was.

Q. What do you think its name was?

A. I am not familiar with the details of our business, as my brother has that in hand himself.

Q. When was that association organized?

A. Couldn't tell you; don't know.

Q. When did your firm become a member of it?"

383 —. I think our firm became a member during the years 1906 and 1907. (R., Vol. 2, p. 448.) At the time that suit was brought, and up to the final judgment in 1909, our firm was a member of that association. (R., Vol. 2, p. 454.)

"Q. Your brother was authorized to carry on correspondence for the firm—the Larabee Flour Mills Company?

A. Yes, sir." (R., Vol. 2, p. 473.)

I am a member of the Southern Kansas Millers' Commercial Club, and was during the years 1906 and 1907, and up to the present time. I might have been chairman of some committee. (R., Vol. 2, p. 543.) F. D. Stevens was manager or superintendent of that association, and lived at Wichita. He was paid \$200 a month salary. (R., Vol. 2, p. 544.) I have seen a copy of the by-laws. My recollection is that I am a member of the executive committee at this time. (R., Vol. 2, p. 547.) (See letter of C. V. Topping, of date November, 1906, R., Vol. 2, pp. 549-550-551.)

"Q. I will ask you if you did write to him on receipt of a letter of this kind, advising you about the situation? (R., Vol. 2, p. 551.)

A. It might be. My attention isn't clear on this. I would have to go back over my files to be positive." (R., Vol. 2, p. 552.)

The attention of the witness was called to a letter, of date December, 1906, to F. D. Stevens (R., Vol. 2, p. 558.)

"The writer has just returned from an extended trip West, and I regret to advise that, on my return, I find flour conditions in Kansas badly demoralized. We find that at St. John and points west of us flour and feed prices are both cut. Feed, as we
384 are reliably advised, being offered at 10 cents under the regular schedule price. After canvassing the situation carefully, we have come to the conclusion the present prices have lost to us most of the trade. This party comes in and takes one customer, and that party another. In endeavoring to hold conditions permanent we have lost out here and there, and take no retaliatory measures to protect ourselves. Our trade is practically wiped out in the

state, and we have now decided we will make such concessions as are necessary to meet competition and secure to our mill its fair share of the overtrade. We do not wish to take this step, but in case you hear the Larabee mill is cutting prices you will know the reason why, The Claflin mill is a disturbing element in some of our territory. Yours truly,

THE LARABEE MILLING COMPANY."

(R., Vol. 2, p. 559.)

"Q. Did you write that letter?

A. I don't know whether I did or not. Is it a matter of record—of court record—in Sedgwick County?

Q. Yes.

A. That was all settled by decree, wasn't it?

Q. I asked you, did you write this letter?

A. I don't remember.

Q. Would you say you did not write it?

A. No, I won't say I did not write it."

I cannot guess what I meant by the terms of the letter. (R., Vol. 2, p. 560.)

"Q. And you wouldn't care to give any interpretation of what you meant in that letter by the term 'regular price'?

A. As I feel about those letters you have read there, my
385 brother and I feel they were all disposed of in a court decree. I was enjoined from violating the law, according to that decree.

Q. I am not going to be satisfied with that answer. I want to know—you are an intelligent man, a successful business man, and you know what you meant when you said in that letter the Claflin mills is a disturbing element in some of our territories?

A. I probably meant what I said." (R., Vol. 2, p. 561.)

See also the letter of about the same date to F. D. Stevens, in which it is stated (R., Vol. 2, p. 563):

"We have decided the only thing for us to do to protect our trade is to get right after the price cutters, and do it up brown. Will say this is not our low note. We will make another cut in a few days, if we do not get enough business from the first one. We can easily see 20 cents more reduction, if we find it necessary. * * *

It is easy enough for some of the price cutters to step over and swipe some of our trade and immediately hop back on the reservation and say they will be good. What we want is some assurance those people will be good all the time, and, until we feel satisfied such is the case, we are not going to be good ourselves." (R., Vol. 2, p. 564.)

"Q. Did you write that letter?"

(See explanation of the letter by witness, Vol. 2, p. 567.)

386 "Q. Did you ever have in your possession schedule of prices for flour and grain prepared by the association or the managing officer of it?

A. Well, I have had information as to what present prices were—that is, different mills—what quotations they were making.

Q. From whom did you get that?

A. I have had the information received direct from the mills themselves and information that has been tabulated.

Q. By Mr. Stevens?

A. Yes." (R., Vol. 2, p. 570.)

I possibly received the letter from F. D. Stevens of date October 7th, 1905. (R., Vol. 2, p. 575.) From the time of the organization of our association, with Mr. F. D. Stevens as manager, so far as I am advised, there has been no radical change or modification in the plan of operation down to this day (R., Vol. 2, p. 588) with the same management and the same authority. I was present at the meeting at the Baltimore Hotel, Kansas City, December 11th, 1905. (R., Vol. 2, pp. 595-596.)

The evidence of F. D. Larabee, F. S. Larabee and F. D. Stevens, and the minutes of the proceedings of the Southern Kansas Millers' Commercial Club and of the Oklahoma and Texas Millers' Association, and the correspondence passing between the officers of the several associations and the several millers conclusively establishes the fact that, prior to August 1st, 1906, and down to January 1st, 1909, and since said date, the Larabee Flour Mills Company, and each member thereof, belonged to an organization of which the

said F. D. Stevens was manager, for the purpose of creating
387 and carrying out restrictions in trade and commerce, and aids to commerce, and to carry out restrictions in the value and free pursuit of the business of buying and selling grain, and the manufacture and sale of flour and meal by the members thereof and belonging to such association, and for the purpose of increasing and reducing the price of merchandise, produce and commodities, and to prevent competition in the manufacture, making, transfer, sale and purchase of flour, wheat, grain and the products thereof, and to fix a standard or figure whereby the price to the public of wheat, grain, flour and the products thereof should be controlled and established, and that they had entered into and belonged to a combination, as such partners and the Larabee Flour Mills Company, under a contract and agreement, express or implied, by which they bound themselves not to sell, manufacture, dispose of or transport any wheat, meal, grain or flour, or the products thereof, below a common, standard figure, and to preclude a free and unrestricted competition among themselves and others in the transfer, sale and manufacture of wheat, grain, flour and meal—in violation of the laws of the State of Kansas. And further shows and establishes the fact that the said Southern Kansas Millers' Commercial Club, of which the said Larabee Flour Mills Company was a member and F. D. Stevens, their agent and authorized officer, was its manager, had entered into a combination and conspiracy between the Oklahoma Millers' Association and the Texas Millers' Association, and the members thereof, in violation of the

388 Sherman Anti-Trust Act, and for the purpose of fixing a standard of prices for wheat, flour and meal, and the products thereof, manufactured by the millers in such association. And

such evidence further establishes the fact that the said Larabee Flour Mills Company operated its said mill at Stafford, Kansas, during the time covered by the subject matter of this controversy, from August 1st, 1906, to July 1st, 1907, and since said date, in combination with the millers in Southern Kansas, for the purpose and with the intent, and under an agreement and understanding, that they would carry out restrictions in the purchase and manufacture of wheat, grain, flour and meal, and the products thereof, and would monopolize the business and prevent competition—all in violation of the laws of the State of Kansas and of the acts of Congress in such cases made and provided.

At the conclusion of the evidence on the part of plaintiffs in support of their claim for damages, the defendant moved to strike out all of such evidence, in addition to the reasons hereinbefore given when objection was made thereto, for the further reason that it was disclosed and established by the evidence of plaintiffs that plaintiffs, from August 1st, 1906, and long prior thereto, and ever since said date, had been and were members of and belonged to a combination and conspiracy between themselves and the millers of Kansas, organized and created for the purpose of controlling the price of wheat, grain and flour and meal, and their products, and in a combination and conspiracy with the millers of the
389 State of Oklahoma, and also of the State of Texas, for the same purpose—all in violation of the laws of the State of Kansas in such cases made and provided, and in violation of the acts of Congress in such cases made and provided; and that said plaintiffs, for such reasons, were disqualified from maintaining and prosecuting this action to recover such damages, and that to allow said plaintiffs any damages on account of the matters and things complained of would be to approve, affirm and confirm the said unlawful combination and conspiracy, thereby enabling the plaintiffs to invoke the process and judgment of the court for the purpose of recovering damages shown to have accrued to them, if at all, as a result of an unlawful combination and conspiracy, in violation of the laws of the State of Kansas as aforesaid and of the acts of Congress; which objection was by the Commissioner overruled, to which defendant at the time duly and seasonably excepted.

The within and foregoing is here submitted as a correct abstract of the evidence taken before the Commissioner and the proceedings of the court upon which the Commissioner is to act.

Respectfully submitted,

B. P. WAGGENER,
Attorney for Defendant.

Index.

	Page
Stipulation Reserving Rights of Each Party.....	2
Alternative Writ of Mandamus.....	3-6
Findings of Fact of Commissioner.....	7-19
Plaintiff's Original Claim for Damages.....	20-25
Supersedeas Bond, Supreme Court of United States.....	26-27
Amended Statement and Claim by Plaintiff for Damages...	28-33
Order Appointing Commissioner.....	34-50
F. D. Larabee.....	51-60
Frank S. Larabee.....	61-64
Joseph G. Waters.....	71-72
Edward D. McKeever.....	74-77
J. F. Switzer.....	77-78
J. J. Schenck.....	78
A. B. Quinton.....	78-79
F. S. Larabee.....	81
F. D. Larabee.....	81-86
J. G. Waters.....	86-107
John F. Switzer.....	110-112
Charles Blood Smith.....	112-117
A. M. Jackson.....	117-124
A. M. Harvey.....	124-125
Lee Monroe.....	126
Matt G. Campbell.....	144
M. A. Low.....	144
O. J. Wood.....	144
J. D. McFarland.....	144
J. S. West.....	144
T. F. Garver.....	144-145
W. R. Smith.....	145
J. G. Slonecker.....	145
H. L. Alden.....	145
R. Miller.....	145
A. L. Berger.....	145
Statutes of United States.....	145-146
By-Laws of Commercial Club.....	148-150
F. D. Stevens.....	150-190
C. W. Binkley.....	190-193
F. S. Larabee.....	193-197

391 Filed Apr. 20, 1911. D. A. Valentine, Clerk Supreme Court.

In the Supreme Court of the State of Kansas.

No. 15167.

THE LARABEE FLOUR MILLS COMPANY, Plaintiff,
vs.

THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Statement, Brief and Supplemental Abstract.

B. P. Waggener, Attorney for Defendant.

392 In the Supreme Court of the State of Kansas.

THE LARABEE FLOUR MILLS COMPANY, Plaintiff,
vs.

THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Statement.

The Court is undoubtedly familiar with the general facts of the case. The question now before the Court is to what extent, if at all, the report of the Commissioner or Referee shall be approved. There are two items or classes of items allowed by the Commissioner or Referee which are objected to and exceptions to which have been filed, viz.:

First. The items or claims numbered 1, 2, 3, 4, 17, 18 and 21.

Second. The items or claims numbered 9, 10, 12, 13, 14 and 15.

393 The objections on the part of the defendant will be presented to the foregoing items or claims in the order stated.

The defendant objects to the allowance of any amount, for the reasons which will be fully presented in Subdivision 3 of this Brief.

394 *Brief and Supplemental Abstract.*

First.

The Commissioner erred in receiving incompetent evidence, and in basing any finding thereon.

It will be observed that, by stipulation (Counter-Abst., p. 2), "each party has the right to make any objection or exception to the Referee or to the court to any question, evidence, matter or proceeding herein, to the same purpose and with like effect as if such objection or exception had been made and exception noted at the proper time, etc.," so that any objection now made is timely.

The Commissioner copies in his report and finding the examina-

tion-in-chief of F. D. Larabee, and bases his conclusion on that alone; and thereon the Commissioner states that:

"Beginning with page 519, Volume 2, Stenographer's Transcript, the witness F. D. Larabee was cross-examined as to the correctness of two statements of expenses for hauling from the mill to the Santa Fe and loading cars. This cross-examination, and the answers of the witness to the questions of counsel therein, did not have reference to the list from which the witness had testified in chief hereinbefore quoted as appearing on page 418, Stenographer's Transcript, but it refers to a schedule filed in the Supreme Court at or about the time of awarding the peremptory mandamus, and to a second schedule or statement filed at or about the time of entering
395 the mandate of the Supreme Court of the United States.

The judgment of the Commissioner finding the amounts of liability for this hauling and loading service was and is based upon the direct and positive testimony of the witness Larabee contained in pages 418 and 419, Volume 2, Stenographer's Transcript. The Commissioner is of the opinion that the testimony was not secondary evidence, nor hearsay, and was competent, and the objections to its reception were on that ground disallowed."

The Court, by examining the record, will see at a glance, we think, wherein the Commissioner is in error. Each schedule of expense (called by the Commissioner "list")—the one filed in the first instance and the amended schedule—had reference to the amount of expense incurred, and claimed as an item or element of damage. If the conclusion reached by the Commissioner is correct, then the efficacy of cross-examination ceases to be a factor in arriving at a correct result. The Commissioner, after copying a part of the testimony of F. D. Larabee, says in his report:

"I conclude from this that witness was using a list from which he testified, but there is nothing to warrant the conclusion that he was not testifying from his own knowledge as to the actual amount paid, and as to the service rendered."

In this connection special attention is called to the fact that F. D. Larabee is the only witness who testifies on the subject of expenses incurred. The bookkeeper was not produced. The superintendent,

396 John Stevens, whose duties required him to "look after the yards, loading and unloading outbound business" (Rec., Vol. 1, p. 182; Deft.'s Abst., pp. 64-65), was not called to testify to any expense incurred. Fred Newman, the foreman, who "checked all the stuff out and superintended the checking of the stuff in and out," did not testify as to the number of days he worked or the expense incurred.

On cross-examination of F. S. Larabee (Rec., Vol. 2, p. 517) he stated:

"Q. Did you assist in making up the list of expenses made necessary by the interruption of the switching service?

A. Not altogether, Mr. Waggener, you take the payroll for our teams and men engaged in hauling over there. I didn't have anything to do with that. Our bookkeeper made that up.

Q. You wouldn't be able to testify directly as to that?

A. No, sir."

And on cross-examination F. D. Larabee (Vol. 2, Rec., p. 519) testified as to statement of expenses prior to date of judgment, and was asked this question (Vol. 2, Rec., p. 521):

"Q. Well, we will leave out the word 'inconvenience' for wages, labor and teams, and all, if you so testify that was \$535.85. Is that correct?

A. Mr. Waggener, we later, at the request of the Supreme Court, filed a statement of expenses. Now, that statement was made a matter of record in the Supreme Court, and honestly prepared by our bookkeeper, and I afterwards checked it with him. Now, I don't remember what figures might have been submitted before that, but that statement that was finally filed in the court was a correct transcript of our expenses from the book.

397 Q. I am asking you the question if you testified, as I have stated, that your expense until the 27th of October, 1906, during the entire interruption of this business, for wages you paid for teams engaged in hauling, and the men who were required to stow away stuff, was \$535.85?

A. That was from what time?

Q. That was from the beginning of this interruption down to the 27th of October, 1906, according to this record here.

A. I cannot say whether it was or not, Mr. Waggener.

Q. Well, you intended it to be correct, if you so stated?

A. I presume I did. I tried to tell the truth as far as I knew it.

Q. Your testimony was given at the town of Stafford, where you had access to your books?

A. Yes.

Q. You had before you the statement, did you not? (Rec., Vol. 2, p. 521.)

A. I don't remember.

Q. Would you have pretended to give the exact amount, \$535.85, as a mere guess?

A. No. It was from the record, but I cannot tell you what it was, or whether it was a correct record at this time.

Q. But you say that, in obedience to the order of the court or request, you filed a statement which was absolutely correct?

A. Of the expense incurred?

Q. Yes.

A. Yes, that statement was correct.

Q. That statement is correct?

A. I feel confident of that.

Q. And that was prepared after consultation with your bookkeeper, and your intention, as you have stated here, was to make it absolutely correct?

A. Yes.

Q. I find on pages 44, 45 and 46 of Exhibit 'Y,' that schedule that gives the entire expense, as I gathered it, down to and including the 8th day of December, 1906, as \$1,056.39. Is that cor-

398 rect?

A. I cannot say whether that is correct or not.

Q. Haven't you stated you knew it was correct?

A. No; I am referring to the last statement that was filed in the court—the last statement.

Q. Where did you get this statement?

A. I think that it was prepared by the bookkeeper. I am not sure. (Rec., Vol. 2, p. 522.)

Q. Didn't you testify a few moments ago the first statement that was filed—an itemized statement was prepared and was absolutely correct?

A. Well, I am referring to the last statement filed after the judgment of the case in the Supreme Court of the United States.

Q. Would you say statement, Schedule A, on pages 44, 45 and 46 of Exhibit 'Y,' is not correct?

A. No, I would not.

Q. Who furnished that statement?

A. Our bookkeeper.

Q. And his instructions were to furnish a correct statement?

A. Yes, sir.

Q. And your impression would be that it was correct, would it not?

A. If he got in all the items that he was instructed to.

Q. This is given by days?

A. Yes, I understand.

Q. And the name of the party?

A. Yes.

Q. Now, that same statement begins on pages 42 and 43, and that appears to have been filed on the 15th day of December, 1906—that statement was filed after the decision of the Supreme Court of the State of Kansas, was it not?

A. Yes, sir. (R., Vol. 2, p. 523.)

Q. And was intended to be a correct statement of the amount of damage which you had sustained, and the claims that you were entitled to—that is correct, is it not?

A. Full claim for the amount of damage?

Q. Yes.

A. Mr. Waggener, I think there are other items that are not included in that that are included in the bill preceding that.

399 Q. I am asking you if, when that statement which was filed October 15th, 1906—after the decision of the Supreme Court of Kansas was prepared—if the intention was to include all your items of damage up to this time?

A. Under the heading Schedule A?

Q. Beginning on page 42.

A. Yes, I think beginning from page 42.

Q. Down to and including page 46?

A. Yes.

Q. That is correct, is it?

A. That is correct, I think.

Q. In that statement No. 1, Item No. 1, on page 42 of the Record, it says: 'First. A claim for hauling flour and mill feed from the mill to the cars on the Santa Fe track; a force of men and teams was necessarily employed to do this transferring; the items to whom paid

are embraced in Schedule A, hereto attached and made a part of this claim and aggregating the sum of \$1,056.39, up to December 8th, 1906.' That is correct, is it? (Rec., Vol. 2, p. 524.)

A. Well, as I tell you, I didn't check this statement here. It was the one that was filed—the last one that was filed I checked.

Q. You have stated this was correct?

A. No, I haven't said that was correct. I said I didn't check that statement, Schedule A.

Q. Was it prepared by your bookkeeper?

A. It was.

Q. Under instructions to make it correct?

A. Yes, sir.

Q. And it was taken from your books?

A. Yes.

Q. And is your bookkeeper in your employ now?

A. Yes.

Q. He is a competent man?

A. I call him to be.

Q. How long has he been in your employ?

A. Five or six years.

Q. His instructions were to prepare correct statements of
400 these items from your books?

A. Yes, sir.

Q. And he prepared that and gave it to you, and you to your attorney?

A. Yes.

Q. Item No. 2, page 43, which reads: 'A like proportion of expense for teams and laborers for hauling like products from the mill to the Santa Fe cars for every mill day since, up to the time that the traffic shall be resumed, and which will be for each of such days full \$12.70.' That was made for you, and you don't know whether that is correct? (Vol. 2, p. 525.)

A. No, sir.

Q. Item 3, page 43: 'A force of four men employed for 83½ days up to December 8, 1906, two at the mill and two at the cars, to assist in loading and unloading, being up to December 8, 1906, 83½ days, for four laborers, at \$1.50 each, and making a total of \$501.' I will ask you if that is not included in the detailed statement, Schedule A?

A. No, sir.

Q. That is in addition to the items in Schedule A?

A. Yes, sir.

Q. Why was it put in that way when you have the first item, the men engaged in loading?

A. Because we didn't always know what men were at the mill or at the car engaged in that work. They were not carried on the pay roll as a special work. They were taken from the regular crew, and put at this work.

Q. Then this is an estimate?

A. No, it is not an estimate. We actually paid that.

Q. Did they perform any other labor in connection with this work?

A. Not when they was doing this, but perhaps some days it would be two men, and the next day two other men.

Q. You say that is not included in Schedule A?

A. That is not included in Schedule A. (Rec., Vol. 2, p. 526.)

Q. Can you give the names of the four laborers referred to in Item 3, page 43?

A. No, I cannot.

Q. Will your books show it?

401 A. It would show that I have the men employed, but the names of the particular men at this work, it would not.

Q. Where would the bookkeeper get it?

A. He knew there were two men at the cars, and two at the warehouse.

Q. How did he know that?

A. Because he knew it. I knew it.

Q. Where did you get the information?

A. I got it from the pay roll.

Q. Who prepared the pay roll?

A. Superintendent.

Q. Where would the superintendent get the exact hours of labor of these men?

A. He kept it himself.

Q. Have you the same superintendent in your employ now?

A. Yes, sir.

Q. Item 5. For a complete shutdown of the mill one-half day in November and on December 1st, 3rd and 4th, made necessary in consequence of muddy roads, making it impossible to operate the mill and transfer cars at a loss of the known profits of the mill of \$250.00 for each day, and making an aggregate of \$875.00. That is right, is it?

A. I should say it was.

Q. Who furnished that item? Rec., Vol. 2, p. 527.)

A. I presume I did, in making up the bill.

Q. You say now that is correct?

A. I think it is." (Rec., Vol. 2, p. 528.)

From the foregoing, it appears that the testimony of F. D. Larabee was based exclusively upon what his bookkeeper told him he got from the books, and the entries in the books were made from pay rolls prepared by the superintendent, who got his information from the foreman—not one of whom was asked a question as to the correctness of any item making up the aggregate of claims allowed—Nos. 1, 2, 3 and 4. The burden of proof was upon the plaintiffs to prove
402 their claims by competent evidence. They were the custodians of the books, upon which the bookkeeper got the items which F. D. Larabee testified were correct, because he had "checked the books with the bookkeeper," who was honest and competent. No excuse was made or offered for the non-production of the books or the bookkeeper, or superintendent who prepared the pay rolls, or the foreman who furnished to him the data. No one will contend that F. D. Larabee had any independent recollection of the matters about which he testified. Why were not the books produced? Why

was not the bookkeeper called? He was in the employ of the mill company all the time. Why was not the superintendent, Stevens, interrogated as to these items? Why was the foreman, Newman, not sworn?

The Commissioner states (page 8 of Report):

"The judgment of the Commissioner, finding the amounts of liability for this hauling and loading service, was and is based upon the direct and positive testimony of the witness Larabee, contained on pages 418 and 419, Vol. 2, Stenographer's Transcript."

We have, therefore, the finding of the Commissioner that he did not consider the admission of F. D. Larabee (Vol. 2, p. 521 of Rec.), that that statement—referring to the last "statement of expenses," filed "at the request of the Supreme Court"—"was made a matter of record in the Supreme Court, and was honestly prepared by our bookkeeper; and I afterwards checked it with him." * * * "That statement that was finally filed in court was a correct transcript of our expenses from the book."

403 We have, therefore, a right to assume that F. D. Larabee was not giving his independent recollection of anything, but only what his bookkeeper told him, and what he gleaned from the books of the mill company. It will hardly be claimed that F. D. Larabee was attempting to give his independent recollection. It will also not be disputed that a record (books) were kept of all these transactions.

In the case of *Manley v. City*, 9 Kan., 358, it was said that:

"Where a record is kept in a book of the funds received and paid out by a city treasurer, and the different funds are kept separate, such book is the best evidence of what funds are in the hands of the treasurer; and in the absence of proof of loss of such book, or that it was falsely kept, or some other sufficient legal cause for its non-production, the city will not be allowed to prove by verbal testimony the amount of any particular fund in the hands of the treasurer."

It is provided by Section 384, Chapter 182, Laws 1909, p. 398:

"Entries in books and other writings intended as records of sales, purchases, receipts, payments, deliveries, weights, measures, time, transactions, or events, made in the regular course of business of any person, firm, corporation or public officer, as a record of the matters to which they relate, at or near the time of the transaction or occurrence, shall be admissible in evidence on proof that they were so made. Where such entries are in the possession of the adverse party, they shall be produced at the trial on reasonable notice, unless

404 the court or judge excuse such production for good cause, and allow the substitution of a sworn copy thereof to be furnished by the party in possession thereof. Entries in possession of strangers to the suit, which are kept without the county in which the action is triable, may be proven by sworn copies."

In the case of *Kelley v. Stevens*, 58 Kan., 569, it was said that:

"The defendant then introduced in evidence, over the objection of plaintiffs, a written computation, covering substantially the whole of the defendant's claims in the case, based on items furnished by himself and purported copies of the bills on which the bids were said

to have been made, and made by a witness who testified that, from his knowledge of the lumber business, he could determine from the lumber bills the price at which each item in the bill bid on was furnished, and that the computation made by him was in accordance with such prices. Held, that the court erred in admitting the written computation."

In the case of *R. R. Co. v. Osborn*, 58 Kan., 768, it was said that:

"In showing the quantity and value of wheat alleged to have been destroyed by fire, a witness should be confined to his individual knowledge and judgment, and not be permitted to give the estimate or conclusion of another, who also made an examination as to quantity and value."

In the case of *Coder v. Stotts*, 51 Kan., 382, it was said that:

"Before secondary evidence of the contents of an invoice of a stock of goods which had been in plaintiff's possession can be received, he must at least account for the absence of the original."

405 It will be noted, in this connection, that the Commissioner states that:

"I conclude from this that the witness was using a list from which he testified, etc." (See *Kelley v. Stevens*, 58 Kan., 358.)

Who made the list does not appear. If he was testifying from a list, did not that fact warrant the necessary conclusion that he was not testifying "from his own knowledge"?

In the case of *Hall v. Ray*, 18 N. H., 126, it was said that:

"A witness, having testified to certain facts, added that he had ascertained them all by examining books kept by him. The books not having been produced, it was held that the testimony was incompetent."

In the case of *Crawford v. Bank*, 8 Ala., 79, it was held that:

"A clerk of the bank cannot testify to facts of which he has no knowledge, from notes or memoranda taken from the books of the bank."

In the case of *Ry. Co. v. Coleman*, 28 Southern, pp. 828-829, the witness testified from memoranda placed in his hands for the ostensible purpose of refreshing his recollection. The court said:

"We decline to pass upon the testimony of Coleman, based on memoranda or statements—whatever they were—which Coleman was allowed to use to refresh his memory. If they were memoranda—

406 the ones he testified from—made by himself or under his direction at the time of the occurrence of the events recited in them, with personal knowledge that they so occurred, they could be so used. If they were—the ones used on the trial—copies from entries made by a bookkeeper, without personal knowledge of the truth of the entries, long afterwards, it would be idle to say Coleman could refresh his memory from such memoranda, made not by himself, but by another. In such case, the witness must once have known personally the truth of the facts recited in the entry, and so have had once, as to it, a memory, now, on the witness stand, by the entry then made by himself, or one under his direction, to be refreshed. As to a happening touching which a witness never had any actual personal knowledge, he never at any time had any memory to

be refreshed. The memoranda in such case, where sought to be used to refresh memory, as here, are not substantive proof of the truth of the entry recited in them. They do not go to the jury. They are allowed to be used only when they were made by the witness himself or by one under his direction, so that he knows or knew of the truth of the recitation in the entry."

And the court, further commenting upon this evidence, said:

"The law is thoroughly settled on this point. But in this case it is absolutely impossible, from the very irregular course of the examination, to tell what these memoranda were, or when made. It would seem that Coleman made the original entries, at varying times, in some sort of book or books; that he made copies from these books for some purpose, but that these were copies made by his bookkeeper, who made them, from what is not shown."

Bates v. Preble, 151 U. S. 155.

407 But again, is there not another rule which may here be voked? The amended claim of damages which F. D. Larabee says was "filed at the request of the Supreme Court" (Vol. 2, Rec., p. 521) was a "statement of expense," and "was made a matter of record in the Supreme Court, and honestly prepared by our bookkeeper, and I afterwards checked it with him. Now, I don't remember what figures might have been submitted for that, but that statement that was finally filed in the court was a correct transcript of our expenses from the books."

Referring to Schedule A (Vol. 2, Rec., p. 524), F. D. Larabee said:

"Q. Was it prepared by your bookkeeper?

A. It was.

Q. Under instructions to make it correct?

A. Yes, sir.

Q. And it was taken from your books?

A. Yes.

Q. And is your bookkeeper in your employ now?

A. Yes.

Q. He is a competent man?

A. I call him to be.

Q. How long has he been in your employ?

A. Five or six years.

Q. His instructions were to prepare correct statement of the items from the books?

A. Yes, sir.

Q. And he prepared that, and gave it to you, and you to your attorney?

A. Yes."

Speaking of the men employed, referred to in the schedule, and the books showing the items, he testified (Vol. 2, Rec., p.

526):

408 "Q. Where would the bookkeeper get it?

A. He knew there were two men at the cars, and two at the warehouse.

Q. How did he know that?

A. Because he knew it. I knew it.

Q. Where did you get the information?

A. I got it from the pay rolls.

Q. Who prepared the pay roll?

A. Superintendent.

Q. Where would the superintendent get the exact hours of labor of these men?

A. He kept it himself.

Q. Have you the same superintendent in your employ now?

A. Yes, sir."

It, therefore, conclusively appears from the testimony of F. D. Larabee, upon whose evidence the Commissioner solely relies, that the amended and final statement filed with the clerk, at the "request of the court," is a transcript taken from the books by the bookkeeper who got his information from the pay rolls prepared by the superintendent. The same bookkeeper is now, and at the time Larabee testified was, in the employ of the mill company. The same superintendent is now, and, at the time Larabee testified, was in the employ of the mill company. The books containing the items making up the entire claim made in the amended statement filed herein, "at the request of the court," are in the possession of the mill company, and were at the time Larabee testified. The books were not offered in evidence. The bookkeeper who kept the books and made the entries is not produced. The superintendent who made out the pay rolls is produced as a witness by the mill company, but is not interrogated as to any fact peculiarly, and perhaps, solely, 409 within his knowledge. Why was all this evidence concealed?

What justification for permitting F. D. Larabee to use "a list from which he testified," without the slightest attempt to excuse or justify the non-production of the best evidence in the hands and under the control of the mill company?

The rule seems to be elementary that the "unexplained failure to call an employé of one of the parties who has peculiar knowledge of the facts, and is presumably disposed to testify most favorably to his employés, warrants the inference that the testimony would be unfavorable to him."

In the case of *Fowler v. Enzenperger*, 77 Kan. 407, the court said:

"As a general rule, the omission by a party to produce important testimony relating to a fact of which he has knowledge, and which is peculiarly within his own reach and control, raises the presumption, open to explanation, of course, that the testimony, if produced, would be unfavorable to him."

And such seems to be the universal rule.

It was said in *In Re Kellogg*, 113 Fed. 121, that:

"Where a party has it in his power to produce a material witness, and fails to do so, a presumption arises that the testimony would be unfavorable to him."

Roney v. Moss, 74 Ala. 390.

Miller v. Jones, 32 Ark. 337.

In the case of *Vandervort v. Fouse*, 43 S. E. 112, it was said:

410 "Where the burden is on a party to prove a fact material to him, not otherwise clear, his failure, without proper excuse, to produce an important and necessary witness to such fact raises the conclusive presumption that such witness would not prove it, and the party cannot have the benefit of that fact."

Also, in *Union Trust Co. v. McClellan*, 21 S. E. 1025, it was said that:

"Where the burden is on a party to a suit to prove a material fact in issue, the failure, without excuse, to produce an important and necessary witness to such fact raises the conclusive presumption that such witness' testimony, if introduced, would be adverse to the pretensions of such party."

In the case of *Dewing v. Hutton*, 37 S. E. 670, it was said:

"When a party to a controversy fails to examine a material and important witness in his behalf, the law raises the presumption that such witness' evidence, if given, would be adverse to such party."

If there ever was a case which called for the application of the rule that withholding evidence in the control of the party raised a conclusive presumption against him, it is this case. The reasons of Mr. Justice Nelson, in the case of *Clifton v. United States*, 4 How. (U. S.) 247-249, are most pertinent here. He said:

"Under these circumstances, the claimant was called upon by the strongest considerations, personal and legal, if innocent, to bring to the support of his defense the very best evidence that was in his possession or under his control. This evidence was cer-
411 tainly within his reach, and probably in his counting room, namely: the proof of the actual cost of the goods at the place of exportation. He not only neglected to furnish it, and contented himself with the weaker evidence, but even refused to furnish it on the call of the Government; leaving, therefore, the obvious presumption to be turned against him that the highest and best evidence going to the reality and truth of the transaction would not be favorable to the defense.

One of the general rules of evidence, of universal application, is that the best evidence of disputed facts must be produced of which the nature of the case will admit. This rule, speaking technically, applies only to the distinction between primary and secondary evidence; but the reason assigned for the application of the rule in a technical sense is equally applicable, and is frequently applied, to the distinction between the higher and inferior degree of proof, speaking in a more general and enlarged sense of the terms, when tendered as evidence of a fact. That meaning of the rule is, not that courts require the strongest possible assurance of the matters in question, but that no evidence shall be admitted which, from the nature of the case, supposes still greater evidence behind in the party's possession or power; because the absence of the primary evidence raises a presumption that, if produced, it would give a complexion to the case at least unfavorable, if not directly adverse to the interest of the party. This is the reason given for exacting, in all cases, the

primary evidence, unless satisfactorily accounted for. 1 Phillips on Ev. 218, C. & H.'s Notes, 414, 418, and cases.

For a like reason, even in cases where the higher and inferior testimony cannot be resolved into primary and secondary evidence, technically, so as to compel the production of the higher, and the inferior is, therefore, admissible and competent without first
412 accounting for the other, the same presumption exists in full force and effect against the party withholding the better evidence; especially when it appears, or has been shown, to be in his possession or power, and must and should, in all cases, exercise no inconsiderable influence in assigning to the inferior proof the degree of credit to which it is rightfully entitled.

It is well observed by Mr. Evans (2 Evans Pothier 149), in substance, that if the weaker and less satisfactory evidence is given and relied on in support of a fact, when it is apparent to the court and jury that proof of a more direct and explicit character was within the power of the party, the same caution which rejects the secondary evidence will awaken distrust and suspicion of the weaker and less satisfactory; and that it may well be presumed, if the more perfect exposition had been given, it would have laid open deficiencies and objections which the more obscure and uncertain testimony was intended to conceal."

In the case of *Eckel v. Eckel*, 27 Atlantic 433, it was said:

"The non-production of papers essential in the trial of a cause, which are proved to be in the possession of one of the parties, unexplained, raises a presumption that they contain something which would tend to the disadvantage of the party retaining them if they were produced."

How was it possible for F. D. Larabee to testify as to the number of men who worked each day from September 1, 1906, to April 1, 1907, unless he kept the pay roll? He forecloses himself when he swears most positively that the pay roll was kept by the superintendent, and by him furnished to the bookkeeper.

413 How could he testify to a "force of four men employed 168½ days in loading and unloading flour transferred by teams from the mill to the Santa Fe track," having kept no memorandum himself, as he swears it was kept by his superintendent?

In this connection the attention of the Court is called to the fact that F. D. Larabee has put in a large bill for his per diem attending the many hearings in this matter, and swears that he was personally present at Hutchinson and Topeka during the days when he must have been at Stafford to give him any personal knowledge of the facts about which he testifies. The Commissioner allows the mill company \$10 per day for eleven trips of F. D. Larabee to Topeka, and other trips to Hutchinson, and allows \$3,768.10, based solely upon the testimony of F. D. Larabee, upon facts about which he had no personal knowledge, and based solely upon secondary and hearsay evidence. If the rights of parties litigant are to be thus frittered away, and the rules of evidence brushed aside in violation of every known precedent, courts of justice might well be abolished

and the jurisprudence of our country no longer revered, except as the baseless fabric of a dream.

(a) The Commissioner, in his report, states that the following evidence, copied in full in his report (pp. 6-7), is the full evidence upon which he bases his finding allowing \$3,768.10 as damages, viz.

"Q. Mr. Larabee, referring to this statement for damages, I call your attention to the first claim for hauling flour, grain and mill stuffs and feed from the mill and elevator of plaintiff to the cars on the Santa Fe track, aggregating the sum of \$2,415.65.

414 And the second one, a force of four men employed for 168½ days, two at the mill and two at the cars, to assist in loading and unloading, at \$1.50 for each laborer per day, making a total of \$1,011.00. Will you state to the court what you paid out,—what you engaged the men for,—give as near as you can this information in detail?

A. We have the items here.

Q. Is that a list of laborers you employed and paid for all this service?

A. Yes, sir.

Q. By what reason was it made necessary to do that?

A. It was necessary on account of no switching.

Q. It was obligatory?

A. Either that or shut down the mill.

Q. Have you got the list there? How much is that claim there—\$2,415.65? Does that represent the correct list?

A. Yes, sir.

Q. And was money that was paid out by you for that service?

A. Yes, sir.

Q. The entire \$2,400.00?

A. I think that it is, the entire \$2,400.00, the first claim. (The statement in question was marked Exhibit 'A' and is found as Exhibit 'A' at the end of Volume 3 of the official transcript.)

Q. Now, we will take the second claim. A force of four men employed for 168½ days, two at the mill and two at the cars, to assist in loading and unloading, at \$1.50 for each laborer per day, making a total of \$1,011.00. Will you please state to the court what that was for?

A. Two men to assist in loading the wagons and two men at the cars to assist in unloading.

Q. Common laborers?

A. Common laborers.

Q. How much did you pay them?

A. \$1.50 per day.

Q. How many days?

A. 168½ days.

Q. Would that have been necessary had the switching service been there?

A. No, sir.

415 Q. What was the total of that expense?

A. \$1,011.00.

Q. Now, we will go to the third claim, for the time of Fred New-

man, necessarily occupied in overseeing and attending to the transfers 168½ days, at \$2.50 per day, making a total of \$420.25. Please tell the court about that.

A. Mr. Newman was the foreman that checked all the stuff out. He had the superintending of the loading and check cars. He saw that the stuff got in the right cars, and the right amount, and so on.

Q. Was that made necessary by the discontinuing of this transfer service?

A. It was.

Q. You were paying him \$2.50 per day?

A. We were.

Q. Was this amount actually paid out by you?

A. It was.

Q. \$420.25 to Newman?

A. Yes, sir. We had to employ another man in his place."

The foregoing is copied here in full because the Commissioner has copied it in his report, and finds that it is all the evidence offered in support of items involved in the first, second and third claims, viz:

First claim	\$2,386.85
Second and third claims.....	1,381.25
Total	<u>\$3,768.10</u>

Independent of the cross-examination, this testimony of F. D. Larabee,—the sole support for the finding of \$3,768.10,—shows conclusively that he was testifying from a "list"—a "statement"—marked Exhibit "A," as a part of his evidence. But, if there was any doubt about it, the Commissioner has put that doubt at rest by finding "that the witness was using a list from which he testified." If he testified from the list, he could not have testified from his memory.

But the Commissioner is radically wrong in his conclusion (Rept. p. 7) that "there is nothing to warrant the conclusion that he was not testifying from his own knowledge as to the actual amount paid, and as to the services rendered," for F. D. Larabee clearly shows that he got all the data as to both statements from his bookkeeper (Vol. 3, Rec., pp. 1432-1433).

"Q. Mr. Larabee, you filed a statement for claim for damages in the Supreme Court of the State on December 15, 1906; the first item is 'Claim for hauling flour and mill feed from the mill to the cars on the Santa Fe track; a force of men and teams was necessarily employed to do this transfer. The items to whom paid are embraced in Schedule A, hereto attached and made a part of the claim, and aggregating the sum of One Thousand Fifty-six Dollars Thirty-nine Cents, up to December 8, 1906.' Was that schedule referred to taken from your books?

A. Yes, that was furnished me by my bookkeeper.

Q. Did your books show that?

A. If we have those original check records, but I don't know whether we have those original check records or not.

Q. At all events, you would be willing to state that would be a correct statement from your check records or books?

A. Oh, yes, I am confident those are correct records.

* * * * *

Q. So that would begin from the date of the filing of the statement up to the time when that service might be resumed?

A. Yes, sir.

Q. I find this statement: 'A force of four men employed for eighty-three and one-half days up to December 8, 1906, two
417 at the mill and two at the car, to assist in loading and unloading, being up to December 8, 1906, eighty-three and one-half days for four laborers, at \$1.50 each, and making a total of \$501.00.' Was that taken from your books?

A. I think that was, the same as the hauling expense.

* * * * *

Q. Now, then, up to December 8, 1906, the amount of damage which you claim to have sustained is included in paragraphs 1, 2, 3, 4, and 5 of this statement from your books?

A. I think that is right."

This in connection with his statement (Vol. 2, p. 521, referring to final statement filed in court), wherein he states most positively that: "It was made a matter of record in the Supreme Court, and honestly prepared by our bookkeeper, and I afterwards checked it with him. Now, I don't remember what figures might have been submitted before that, but that statement that was finally filed in the court was a correct transcript of our expenses from the books."

Again, he was asked (Vol. 2, Rec., p. 521):

"Q. Your testimony was given at the town of Stafford, where you had access to your books?

A. Yes.

Q. You had before you the statement, did you not?

A. I don't remember. (Vol. 2, Rec., p. 522.)

Q. Would you have pretended to give the exact amount, \$535.85, as a mere guess?

A. No, it was from the record, but I cannot tell you whether it was a correct record at that time.

Q. But you say that, in obedience to the order of the court, or request, you filed a statement, which was absolutely correct?

A. Of the expense incurred?

418 Q. Yes.

A. Yes, that statement was correct.

Q. That statement was correct?

A. I feel confident of that. (Vol. 2, Rec., p. 522.)

Q. And that was prepared after consultation with your bookkeeper, and your intention, as you have stated here, was to make it absolutely correct?

A. Yes."

And finally he c-inches the whole matter by admitting, under oath (Vol. 3, p. 1442), referring to the last statement filed, that: "I think it was taken the same as the first statement filed, from the books."

The Commissioner states in his report (Rep., p. 2) that: "To determine justly the amount the mill company is entitled to recover on this claim, there should be deducted two dollars per car for each load transferred by teams. The evidence does not show the number of cars loaded from teams, nor is the data given in the evidence sufficient to enable me to form a just estimate of the number."

In his testimony F. D. Larabee stated (Vol. 2, Rec., p. 425):

"Q. How many cars of grain, flour or mill stuff did you load on the Santa Fe by teams?

A. I cannot tell you without referring to the books. I think I can get that."

He subsequently produced a list, in the record, which shows the following shipments over the Santa Fe, viz:

419	September, 1906	87 cars.
	October, 1906	89 cars.
	November, 1906,	73 cars.
	December, 1906	101 cars.
	January, 1907	75 cars.
	February, 1907	88 cars.
	March, 1907	84 cars.
		<hr/> 597 cars.

The mill company had in its possession the evidence to show the facts. The Commissioner finds that, to "determine justly the amount that the mill company is entitled to recover on this claim, there should be deducted \$2.00 per car for each carload transferred by teams," and then states that: "The evidence does not show the number of cars loaded from teams." Nevertheless, the Commissioner proceeds to allow the claim. This claim allowed, therefore, by express finding of the Commissioner, is unjust. The burden of proof was upon the mill company to prove the justice of its claim. It had in its possession the evidence. If it did not produce it, the railway company should not be punished by a judgment against it for what the record shows is an unjust claim. Larabee says the books will show it all. Why were the books suppressed?

b. There was no warrant or authority for allowing any item of damage which accrued after the date of the judgment of this Court, December 8th, 1906.

To avoid repetition as much as possible, this objection will be hereafter discussed as to each item of damage which is claimed to have accrued after the date of the final judgment in this court—December 8, 1906.

420 c. The allowance of any amount as claimed in items one, two and three denies to the defendant the equal protection of the law.

To avoid repetition, this proposition will be hereafter presented and discussed under one subdivision, as applicable to each claim for or item of damage.

d. The allowance of the fourth claim or item of \$1,890.00 is not supported by any competent evidence, and is unwarranted in law.

The Commissioner finds that:

"By reason of the suspension of the transfer service, and the consequent inability to operate the mill during the 13½ days mentioned, the mill company sustained a loss of profit from the operation of the mill in the amount of \$140 per day, making a total loss of profit of \$1,890.00."

Our contention is:

First. There is no competent evidence to support this finding, and this item should be stricken out.

It is true that F. D. Larabee testifies that the mill was shut down 13½ days (Vol. 2, Rec., p. 328), but all of this was secondary evidence, and therefore incompetent. He testified as follows (Vol. 2, p. 335):

Q. You had been operating your mill with this team transfer?

A. Yes.

Q. And to its full capacity?

A. Yes.

Q. A half day in November,—what date was that,—1906?

A. I don't remember. It was given in the claim. I cannot remember.

Q. One-half day in November, 1906?

A. I may have to get the records to show you what day it was, if it does not state in the claim.

* * * * *

421 Q. Now, with reference to December 1st, 1906—have you any personal recollection of the shutdown on that day being on account of muddy roads?

A. All of those shutdowns were on account of muddy roads.

Q. What record have you to indicate that?

A. A long order kind of record.

Q. Does it show that the shutdown was for that purpose or another?

A. I think it does.

Q. Who kept that record?

A. Mr. McCord." (Vol. 2, Rec., p. 335.)

(In this connection, the special attention of the Court is called to the fact that F. C. McCord, who kept the record of the days the mill was shut down, as testified to by F. D. Larabee, was the assistant manager of the Mill Company, and introduced as a witness by the Mill Company (Vol. 1, Rec., p. 154), and was not asked to produce the record he had kept, and it was not produced. Neither was he interrogated or asked a single question about the alleged shutdown of the mill on account of muddy roads.)

* * * * *

"Q. How was your product registered?

A. By hourly records, count.

Q. This was done by records?

A. Yes, sir. (Vol. 2, Rec., p. 346.)

Q. Have you those records left?

A. Yes, sir, on the sheets.

Q. And then were transferred into your books?

A. Yes. (Vol. 2, Rec., p. 347.)

* * * * *

Q. What was your profit the preceding year?

A. As I told you, I would have to look at my records to tell you that." (Vol. 2, Rec., p. 350.)

John Stevens, the superintendent, was produced as a witness for the Mill Company (Vol. 2, Rec., p. 406), and was asked (Vol. 2, Rec., p. 407):

422 "Q. Do you remember the days you shut off the mill? Do you remember those days?

A. Yes, I remember the days."

But he is not asked the number of days; and still the record is not produced.

F. D. Larabee further testified (Vol. 3, Rec., p. 1440):

"Q. Did you run the mill to its full capacity during the months of September, October, November and December?

A. I think we did.

Q. And up to the first of April?

A. I think so. Well, Mr. Waggener, there was a short time we were shut down some time in the spring.

Q. That was for repairs?

A. Yes, that was for repairs.

Q. But up to the first day of April, 1907, when that switching service was resumed, so far as the flour output was concerned, the mill was run (Vol. 3, Rec., p. 1440) or operated at its full capacity?

A. No, I won't say that. I stated it was full time, comparatively.

Q. Taking the number of cars you shipped, as shown by this schedule here, it was larger for the months I have spoken of than ever before in the history of the mill, was it not?

A. Well, I rather think it was. My recollection now,—I can't absolutely remember—

Q. Now, then, so far as the operation of the mill for the flour purpose was concerned was operated at its full capacity, comparatively speaking?

A. I think it was."

And it is conceded, because Larabee swears to it, that the net profits of the Mill Company from July 1, 1906, to July 1, 1907, were \$42,000.00, by far the greatest in the history of the mill. The Commissioner, nevertheless, allows the item of \$1,890.00 for a complete shutdown for 13½ days, and the car record of
423 shipments out on most of those days were as great, if not greater, than any other day.

Recurring, however, to the competency of Larabee's testimony, in support of this item: Larabee states, and many times reiterates, that he was testifying from abstracts furnished by his bookkeepers, taken from the books. Again, we most earnestly submit to the Court that

it is strange—passing strange—that, although his testimony was taken in the building where his books were, the books were not produced, although he testified that the books contained the record of the days the mill was shut down, and the cause.

Again, the attention of the Court is called to the fact that Larabee's attorney takes the amended claim for damages, and reads to Mr. Larabee (Vol. 2, Rec., pp. 325-326) the fourth item, and asks him: "Is that correct?"

"Q. Mr. Larabee, you say the dates here represent the shutdown of the mill?

A. Yes."

Not one word to indicate independent recollection on the subject, and, on cross-examination, it appears affirmatively that he had no independent memory on the subject. His entire evidence on this item was hearsay and secondary. No one testifies that he knew the mill was shut down on those dates, but Larabee and his bookkeeper had, at the "request of the court," prepared and filed a "transcript from the books."

It must not be overlooked that all this was received subject to the stipulation that either party had the right to urge any objection, at any time, that could or might have been made at the time,

and upon the assurance of the Commissioner that incompetent evidence would not be considered, and neither party would be bound thereby.

Again, Larabee says that if the mill had not been shut down, he could have manufactured seven hundred barrels of flour, and could have sold it at a profit of 20 cents per barrel. This was all speculative, and merely the opinion of the witness. From what source did he get his data? Nothing in the record to show it. His pretense is that the roads were muddy, and they could not haul the product; yet the records show that the mill company shipped out more flour during those months than ever before.

The exhibit verified by Larabee shows the following, among other shipments, viz.:

Date.	Car No.	Initial.	Destination.	Weight.
1906.				
Nov. 1.	6501	A. T.	Scammon, Ks.	28,080
Nov. 1.	73465	P. R. R.	Olean, N. Y.	36,592
Nov. 1.	2567	R. D.	San Diego,	65,820
* * *				
Dec. 3.	30628	A. T.	Success, Ark.	29,480
" 3.	36642	Sou.	K. C., Mo.	26,550
" 3.	30427	A. T.	Joplin, Mo.	40,000
" 3.	10322	Penn.	Auburn, N. Y.	39,200
" 3.	4732	S. F.	Los Angeles,	64,956
" 4.	19687	A. T.	Scammon, Ks.	37,400
" 4.	40320	M. C.	Marysville,	24,200
" 4.	42216	C. & N.	Downing, Mo.	24,120
" 4.	1740	M. J. K. C.	Carydon, Ia.	24,600
" 4.	4719	S. F. R. D.	Cimarron, Ks.	25,445

"	24.	7489	S. F. R. D.	Ottumwa, Ia.	24,800
"	24.	4989	N. C. & St. L.	Osceola,	29,480
"	24.	8300	A. T.	Eldorado, Ks.	30,760
"	24.	21794	A. T.	Norborne, Mo.	24,000

* * *

"	26.	2776	S. F. R. D.	San Jose, Cal.	58,800
"	26.	3944	S. F. R. D.	Berkley, Ca.	65,856
"	26.	1985	Streets.	Albuquerque, N. M.	43,952
"	26.	16468	A. T.	Cherryvale,	24,380
"	26.	16469	A. T.	Independence,	24,000

* * *

1907.

Jan.	1.	4889	N. C. & St. L.	Springfield,	39,200
"	2.	19372	A. T.	K. C., Mo.	48,100
"	2.	26170	A. T.	Clarence, Mo.	34,000
"	2.	26171	A. T.	Cameron,	24,000
"	2.	18418	I. M. & S.	Drexel, Mo.	30,000

* * *

425

Jan.	12.	40865	A. T.	Webster, Mo.	40,000
"	12.	4094	C. P. & St. L.	Walnut, Ks.	29,210
"	12.	4281	S. F. R. D.	San Diego,	65,856
"	12.	7816	L. E. & W.	K. C., Mo.	40,000
"	12.	4094	C. P. & St. L.	Fredonia,	24,460

* * *

Jan.	28.	17421	A. T.	Marceline,	32,705
"	29.	2034	S. F. R. D.	San Francisco,	58,800
"	29.	7998	C. T.	Harrisonville,	29,680

* * *

Feb.	28.	778	S. F. R. D.	San Francisco,	43,904
"	28.	22822	A. T.	San Francisco	65,858

The foregoing does not include shipments from the mill each month over the Missouri Pacific, and only includes the days of the alleged "complete shutdown." At all events, the physical facts show conclusively that there was no "complete shutdown" of the mill on the days named, on account of muddy roads, or on any other account. Examine the shipments each day from September 1, 1906, to March 31, 1907, and it will readily be seen that the claim of \$1,890.00 damages for a "complete shutdown" of the mill for 13½ days, on account of "muddy roads," is a "fake" claim. For instance, there were shipments made as follows:

1906.

Sept.	3.	.....	2 cars.
"	7.	.....	3 cars.
"	10.	.....	2 cars.
"	12.	.....	2 cars.
"	14.	.....	none.

"	15	2 cars.
"	16	none.
"	17	none.
"	20	2 cars.
"	15	1 car.
"	28	2 cars.
Oct.	12	2 cars.
"	20	2 cars.
"	25	1 car.
"	28	none.

426

Nov.	4	none.
"	7	2 cars.
"	11	none.
"	13	1 car.
"	14	1 car.
"	16	2 cars.
"	17	none.
"	18	none.
"	19	2 cars.
"	21	1 car.
Dec.	1	none.
"	2	none.
"	8	2 cars.
"	9	none.
"	16	none.
"	19	2 cars.
"	25	2 cars.
1907.		
Jan.	1	1 car.
"	5	2 cars.
"	14	1 car.
"	21	1 car.
"	25	none.
"	30	none.
Feb.	2	none.
"	3	none.
"	5	1 car.
"	11	1 car.
"	13	1 car.
"	17	none.
"	19	1 car.
"	27	none.
"	28	none.
Mch.	2	none.
"	3	none.
"	8	1 car.
"	17	none.
"	22	2 cars.
"	24	none.

" 26.....	none.
" 27.....	none.
" 29.....	none.

427 This record, furnished by Larabee himself, absolutely disproves his hearsay statement that his fourth claim for damages "is correct," notwithstanding he swears he got his information from his bookkeeper.

In this connection attention of the Court is called to a most significant fact. It appears from the evidence (see Counter-Abst., pp. 147-200, which Abstract is adopted by the Commissioner as his analysis of the evidence, Com. Rep., pp. 34) that the most effective means used by the Millers' Association to depress the price of wheat and corn was to shut down the mills and thus diminish the demand.

e. The allowance of any part of the fourth claim denies to the defendant the equal protection of the law, and the allowance of that part of it which accrued subsequent to December 8th, 1906, is not within the jurisdiction of the court.

To avoid repetition, this proposition will hereafter be discussed under one subdivision, applicable to each item of damage claimed.

f. The seventeenth and eighteenth claims allowed are without support in the evidence, and have no warrant in law therefor, and should be stricken out.

Independent of the law on the subject, it is almost incredible that the Commissioner should have allowed any part of these claims. If the attendance of the Larabees before the Commissioner was necessary, as witnesses, they were only entitled to the statutory fees, and mileage. The expenses of the trip to St. Louis in an effort to compromise, can hardly be said to be such damages contemplated by the statute as might be recovered in this action.

428 g. To avoid repetition, the question of law applicable to these items will hereafter be discussed.

Second.

The item embraced in the ninth claim of \$2,500.00, for the reasonable value of the services of Waters & Waters for bringing the action and attending to the same in the Supreme Court of the State of Kansas, should be stricken out. It is not supported by any evidence, and is unwarranted in law.

The Court will be much enlightened by reading the testimony of J. G. Waters relative his services in this Court. (Vol. 2, Rec., pp. 661-672.) In that testimony he fixes as the fair value of all his services in this case in this Court at not exceeding \$250.00. All of the time consumed by him in the preparation of the case, hearing before the Commissioner and presentation in this Court, did not exceed five days. He testifies that, for his services in the argument of the case in this Court, "If I got \$50 or \$100 for it, I would be making a fair charge." (Vol. 2, Rec., p. 670.)

The Commissioner, in his report, disregards all of the hypothetical questions and answers thereto, and awards an amount which, in his

judgment, he deems to be reasonable. (Comm'r's Rep., p. 26.) Five of the judges of this Court were on the bench when that case was decided and are familiar with the record and the work of the respective attorneys; and we appeal to your knowledge—your
 429 experience as lawyers—your impartiality and fairness as judges—to right the palpable wrong which has been done by this finding. If the railway company is liable for attorneys' fees, as an element of damage, the railroad company should pay whatever reasonable amount the mill company has paid, or become liable to pay, and no more, but, as we will hereafter show, not only from the evidence but from the Commissioner's finding and report, all sums claimed by the mill company in excess of \$700.00 paid Waters & Waters, and in excess of \$500.00 paid Rossington & Smith, as attorneys' fees, are purely speculative, and its liability to its attorneys based solely upon the contingency that they be collected from the Railway Company.

a. The law applicable to this item, and others of like character, will be presented and discussed hereafter.

b. The items embraced in claims tenth, twelfth, thirteenth, fourteenth and fifteenth, as elements of damage, should be stricken out and disallowed, as not supported by the evidence, and unwarranted in law.

There is no one in the State of Kansas who has a higher regard for J. G. Waters and Charles Blood Smith, or who has a more friendly feeling toward them, than the writer of this brief, but professional duty and obligations as an officer of this Court require that such feelings shall be lost sight of in an effort to prevent what we believe would be an outrage, if these claims are permitted to stand, as a result of neglect to get before the Court the facts as disclosed by the enormous record.

430 By the amended claim of damages it appears that the Mill Company pretends liability for the following items, viz.:

6th. Vandiver & Martin.....	\$25.00
7th. C. G. Webb.....	500.00
8th. J. G. Waters.....	75.00
9th. Waters & Waters.....	2,500.00
10th. Waters & Waters.....	40,000.00
12th. John F. Switzer.....	5,000.00
13th. Rossington & Smith.....	30,000.00
	<hr/>
	\$78,100.00

The mere statement of the claim ought to be sufficient to condemn it; but, having presented it, they started in to prove it by framing a hypothetical question so absolutely foreign to the facts that the Commissioner would not consider the evidence based thereon, but they got into the record the evidence of reputable lawyers, so magnifying the value of their services as to enable them to base thereon an argument before the Commissioner which we do not believe either J. G. Waters or Charles Blood Smith will have the temerity to present to this Honorable Court.

There were some peculiar things about the hearing before the Commissioner, disclosed by the record, worthy of note, but perhaps unworthy of extended comment, which go to show that the Mill Company was not as much interested in the amount of attorneys' fees claimed as were the attorneys. Joseph G. Waters, Charles Blood Smith and John F. Switzer are all able lawyers and capable of representing their client, and protecting their interests.

After a large amount of evidence had been taken before the
431 Commissioner, Mr. J. D. Houston, of Wichita, Kansas, appeared as counsel. (Vol. 2, Rec., p. 617.) On cross-examination of Mr. Waters (Vol. 2, Rec., p. 711) he said:

"Q. Who employed Mr. J. D. Houston in this case?

A. I did.

Q. Because he lived at Wichita?

A. No, sir; I employed him because we had interviewed him in relation to a witness, and we had found out his standing as a lawyer in matters of that kind, and the most able man we could get. We wrote him a letter, and we first interviewed him as a witness, and wrote him a letter that it would be a little uncouth of us to present our own case here—what we were so intimately connected with—and we hired him ourselves—Mr. Smith, Mr. Switzer and myself.

Q. He is not employed in this case by the Larabees?

A. He is not, but with their consent.

Q. He was employed by you because you considered this your case?

A. No, sir; we employed him just exactly as any professional attorney would be. He couldn't act as witness and attorney. They don't do it in the profession.

Q. He was employed by you after consultation with Mr. Switzer and Mr. Smith, to represent you gentlemen?

A. Yes, sir.

Q. And you expect to pay him?

A. We expect to pay him. I agreed to pay him, and I can tell you the amount if you want to know.

Q. All right.

* * * * *

Q. You stated you employed Mr. Houston to represent you in this case, I believe. Is that right?

A. Yes, sir; including Mr. Switzer and Mr. Smith.

Q. Did you advise Mr. Larabee of such employment?

A. Why, I think I did; yes.

Q. Did you give him your reason for such employment?

A. None except the one made here. I told him I had had
432 a discussion with Mr. Houston; that we had gone over it together, and I thought he was the best equipped man in the State of Kansas to examine us witnesses, and especially upon the attorneys' fees.

Q. Is that the only reason you employed him?

A. The only reason in the world.

Q. The only reason you gave Mr. Larabee?

A. The only reason in the world.

Q. Your building is filled up here with lawyers?

A. Yes, sir; and, without saying any discredit to any lawyer that I know of, I don't think, Mr. Waggener, that I know of one that I think on a cross-examination of your witnesses would be his equal, unless it is yourself. (Vol. 2, p. 783 of Record.)

Q. Do you expect to retire from the case as a lawyer because of the interest as a party?

A. No, sir; but, Mr. Waggener, as to the amount of my fee—as to the amount of Mr. Switzer's fee, or as to the amount of Mr. Smith's fee—I don't propose to discuss that feature of it at all.

Q. But Mr. Houston was employed, who resides at Wichita, because of special and exceptional ability in cases of this kind. Is that right?

A. No, sir; he has got an intimate friend in town here, Mr. John F. Switzer, and who suggested to me that—I think he had had a talk with Mr. Houston in reference to this matter, and he suggested to me to have Mr. Houston do it, and if we couldn't, and I don't know of any lawyer in this town that I could get that would be in a condition to do that service that anyways near has got the capacity of Mr. Houston.

Q. There was no motive of any kind?

A. I say no.

Q. Except such as you have stated, and represented to Mr. Larabee?

A. Yes, sir; I have had but very little talk with Mr. Larabee, and I think I never addressed him a letter.

Q. Mr. Houston was employed because of your interest in this case and that of Mr. Switzer and Mr. Smith?

A. Yes, sir—wholly and solely. (Rec., p. 784, Vol. 2.)

433 Q. Was his fee to be contingent?

A. It was not. We agreed to give him—I wrote the letter, and agreed to give him a certain amount of our fees.

Q. Of whatever you recovered in this case?

A. Yes, sir.

Q. In this investigation before the Commissioner, Mr. Houston represents you and Mr. Switzer and Mr. Smith, and for such services he is to receive a certain amount of the fees which you recover?

A. Which the plaintiff recovers, and which we expect to get. There is one thing that I want to add to my testimony.

Mr. Houston: Did you mean to state I am representing on a condition?

A. No, sir; the only thing was, you was to represent the plaintiff in this case, and for no purpose but upon this branch of it, and your fees was to come out of what might be awarded, if anything, to Mr. Switzer and myself and Mr. Smith—but making no additional charge to the plaintiff, but he was to represent the plaintiff.

Q. I was wondering if Mr. Houston might not employ somebody hereafter to represent him?

A. Mr. Waggener, the whole thing is just this: The Kaw river

that first bores through the dam and inundates a valley and destroys an entire city is responsible for the entire damage.

Q. Mr. Houston lives at Wichita?

A. Yes, sir. (Vol. 2, Rec., p. 785.)

Q. And is a practicing lawyer there?

A. Yes, sir; and has been for a number of years.

Q. How many lawyers in Topeka?

A. About 120.

Q. How many in the building where your office is?

A. I would say thirty or forty.

Q. All prominent lawyers?

A. I say—no.

Q. The majority of them?

A. No, sir; if you come down, here is Mr. Schenck, that is county attorney, that is a particular friend of mine, and is a first class lawyer, but he couldn't have anything to do with it because he is engaged.

434 Q. Have you applied to him to represent you in this case?

A. No, sir; I didn't want him. He didn't have time.

Q. Have you applied to any lawyer in the city of Topeka?

A. No, sir. I am acquainted with every lawyer here.

Q. Mr. Houston was not employed because of the fact that he resides at Wichita?

A. Mr. Switzer is a warm friend of his. Of course ever since he has been here, and in discussing here, he says it is improper to make suggestions as to an attorney and be a witness in these cases.

Q. And notwithstanding that, you do not now propose to retire from the case as a lawyer?

A. I want to argue in a small way every feature of this case except the value of our fees.

Q. You propose as a lawyer to continue on in the case to represent the plaintiff as well as yourself? (Vol. 2, Rec., p. 787.)

A. Yes, and I shall do my level best to get all the help I can from Mr. Houston.

Questions by Mr. Houston:

Q. The fact of the matter is that you gentlemen, after talking together, didn't feel like examining each other, and making a presentation of your own fees, and examining witnesses on the amount of them?

A. Yes, sir.

Q. You wanted me to do that for you?

A. Yes, sir.

Q. That is all my connection with the case here?

A. Yes, sir; and I can add further, we had come to the conclusion if we couldn't get Mr. Houston we would get Dumont Smith, who was the next man that suited our idea of what this case was." (Vol. 2, Rec., p. 787.)

And note what F. S. Larabee says (Vol. 3, Rec., p. 1453):

"Q. Has Mr. Houston asked for any remittance?

A. No, sir; he has not. I have never talked fees to Mr. Houston, one way or the other.

435 Q. Have you ever employed him?

A. Not that I know of.

Q. Do you know who did employ him?

A. No; I do not."

And note what Charles Blood Smith says (Vol. 3, Rec., p. 1227):

"Q. Who employed Mr. Houston?

A. I don't know.

Q. Did you?

A. No.

Q. Were you a party to it?

A. I ratified it.

Q. Are you to pay his compensation or the Larabees?

A. I haven't any idea—never thought about it.

Q. Any agreement with him about compensation?

A. None whatever."

Waters says he was employed after consultation with Switzer and Smith. (Vol. 2, Rec., p. 712.)

Another peculiar fact—John F. Switzer has a claim for \$5,000 for his services in the Supreme Court of the United States. He had never been admitted to the bar of that court. He never presented any bill to the Mill Company. He was examined by Mr. Houston (Vol. 2, Rec., p. 828):

"Q. You keep books of account, do you?

A. Yes, sir.

Q. Any charge on your books against these people?

A. I think not. (Vol. 2, Rec., p. 841.) He never received a dollar from the Mill Company." (Vol. 2, Rec., p. 842.)

While the case was pending in this Court, he was of the opinion that services in this Court were worth from \$2,000 to \$2,500 (Vol. 2, Rec., p. 849), and if taken to the Supreme Court of the United States, \$1,000 to \$1,500 more. (Vol. 2, Rec., p. 850.) But
436 he did not testify as to the reasonableness of the claims made in the amended statement. (Vol. 2, Rec., p. 841.) (See Larabee's testimony, Vol. 3, Rec., p. 1446.) Switzer's claim against the Mill Company has long since been barred by the statute of limitations.

Waters & Waters have never made any charge on their books for the \$40,000 or \$2,500, or any part of it, and have made no demand of the Mill Company for it. The most remarkable and unexplained episode in this proceeding is the fact that Charles Blood Smith, after he had put in a claim for \$30,000, would not or did not go on the stand to testify as to what services he had performed until forced to do so, as a witness on behalf of the Railway Company (Vol. 3, Rec., p. 1211), and having testified that he had possession of the books of account of Rossington & Smith, was asked:

"Q. Will you produce them?

A. I will not."

He was also asked (Vol. 3, Rec., p. 1212) :

"Q. The firm of Rossington & Smith and yourself kept a book or books showing all charges you made against your clients for services rendered and moneys expended, and showing all credits on account of payments made by them to you, did you not? (Vol. 3, Rec., p. 1213.)

A. We did."

The Commissioner having required the production of the books, notwithstanding the refusal of Mr. Smith, they were produced (Vol. 3, Rec., p. 1221), in which appears the account with the Mill Company (Vol. 3, Rec., pp. 1222-1226); and this question was asked, viz.:

437 "Q. April 3d. (329.) Just read the item as it appears on the book there.

A. Larabee Brothers, April 23d, by check Larabee Flour Mill Company, balance fee in Company v. Missouri Pacific Railway Company, \$250.00."

Mr. Smith looked upon this case "as one of the greatest cases we had ever had in our office, and involving one of the greatest questions ever presented to any court" (Vol. 3, Rec., p. 1244); and yet he never made a charge on his books for his extraordinary services or presented a bill to the Mill Company therefor, but permitted his books to show that the last payment of \$250.00—of the \$500.00 charged for services—was the balance of his fee. He was asked if, after that payment of \$250.00 in April, 1908 (Vol. 3, Rec., p. 1226):

"Have you since that date presented any bill to the Larabees?

A. Have not.

Q. Have you asked them for any money?

A. Have not."

Under the circumstances, after he had presented the ridiculous claim of \$30,000 it is not surprising that he neglected to go on the witness stand until forced to do so by the defendant. It is not surprising that he refused to produce his books until compelled to do so by order of the Commissioner.

Now in this connection, note on this subject the testimony of F. S. Larabee (Vol. 2, Rec., pp. 386-387):

"Q. You have put in your claim here, item 15, for the reasonable value of the professional services of the firm of Rossington & Smith, attorneys-at-law, for services performed, the sum of \$30,000.

438 Do you consider that you are under any obligation to pay Rossington & Smith \$30,000 in the event the fee is not collectible from the Missouri Pacific?

A. I hardly know how to answer that, Mr. Challiss. I had not thought of that.

Q. In other words, are you trying to speculate on the case, and get out of the Missouri Pacific the best possible compensation you can, based upon a contingency?

A. Do you mean by that, if the court allowed \$30,000 that we would get part of it?

Q. No, sir; I mean in the event the Missouri Pacific should not pay the attorneys' fees, would you feel obligated to the firm of Rossington & Smith in the sum of \$30,000?

A. I could not answer that off-hand.

Q. You are not willing to go upon record to that effect?

A. No; I do not think so.

Q. If the court should eventually determine that there was no obligation on the part of the Missouri Pacific for these attorneys' fees, to what extent would you feel obligated to Rossington & Smith?

A. I cannot answer that question."

See testimony of J. G. Waters. (Vol. 3, Rec., pp. 678-681, 711; Counter-Abstract, pp. 96-103.)

Acting upon this character of evidence, the Commissioner found:

"I find that no agreement has ever been had between the Mill Company and any of the attorneys as to the amount of their compensation; that neither of the attorneys has at any time entered on his books a charge against the Mill Company for services rendered; nor have they informed the Mill Company of the amount intended to be charged; nor have they determined in their own minds any definite amount intended to be charged.

I find that the attorneys will claim the full amount, and
439 will accept whatever amount that shall be determined by this Court in this proceeding to be a reasonable compensation for their services in the case and allowed as part of the damages.

I further find that it is mutually understood between the Mill Company and the attorneys named that whatever amount is recovered in this proceeding on account of fees and expenses of counsel will be paid by the Mill Company to and accepted by the attorneys as a full discharge of the liability to them."

Supported by the evidence, could the Commissioner have reached any other conclusion? What, then, is the legal status of these claims? Has the Mill Company sustained any damage by reason thereof? It has not paid them. There appears from the entire record to be no legal or moral liability therefor, for the Commissioner finds that it "was mutually understood between the Mill Company and the attorneys named that whatever amount is recovered in this proceeding on account of fees and expenses of counsel will be paid by the Mill Company to and accepted by the attorneys, as a full discharge of the liability to them."

Upon what principle or theory of logic can this understanding be so construed, as to show that the Mill Company can possibly sustain any damage by reason of the services and expenses of its attorneys? If the Mill Company is not allowed anything as damages for attorneys' fees and their expenses, then the Mill Company does not pay anything.

The case of McClure v. Scates, 64 Kan. 284, relied on by the Mill Company, holds that:

440 "The plaintiff was entitled to recover as damages the necessary outlay for attorneys, as well as other loss and expenses resulting from the wrong of the defendants."

Under the findings and conclusions of the Commissioner, the Mill Company has not shown that it has been damaged by any "necessary outlay for attorneys," independent of the amount actually paid (about \$700.00 to Waters and \$500.00 to Smith), but the court is gravely asked to allow, as damages to the Mill Company, the damages sustained by the attorneys of the Mill Company. Was such the purpose and intention of the Legislature? Can any such construction be placed on the decision of this Court in the case of McClure v. Scates, *supra*? If the attorneys of the Mill Company made an improvident contract with the Mill Company, should the Railway Company be mulcted in damages to make good their loss? The statute under which the damages are claimed provides that:

"If judgment be given for the plaintiff, he shall recover the damages which he shall have sustained, to be ascertained by the court or jury, or by referee, as in a civil action, and costs; and a peremptory mandamus shall also be granted without delay."

In the case of Underhill v. Spencer, 25 Kan. 71, in order to recover attorneys' fees on an injunction bond, payment is not a condition precedent, but the liability therefor must have "become fixed and absolute." In this case there is neither a "fixed and absolute liability" nor even a contingent liability, but an absolute understanding between the Mill Company and its attorneys that the attorneys' fees and their expenses are not to be paid 441 unless the same shall first be recovered from the Railway Company, and they are to accept whatever is recovered "as a full discharge of the liability to them."

The proposition here contended for has been squarely determined by the Supreme Court of Nebraska in the case of Golder v. Land, 50 Neb. 868-869, wherein the court, discussing the right to recover expenses reasonably incurred, said:

"He may not recover his actual expense, regardless of its reasonableness. On the other hand, he cannot speculate on this item of damages and recover what would be a reasonable expense unless he has in fact incurred it, either by payment or by becoming liable therefor. * * * It is not the reasonable charge for medical services which he may recover, but the expense to him of such services, not to exceed their reasonable value."

This decision is squarely in point. It is not the reasonable value of attorneys' fees which the plaintiff may recover, but the expense to him of such services, not to exceed their reasonable value. How different the attitude of the Larabees in this case. They are seeking a judgment against the Railway Company for the services of their attorneys—not upon the theory of any liability incurred therefor, but solely upon the theory that the Company must pay a reasonable attorney's fee, to be paid only by the Larabees to the extent that the same be found to be reasonable, and the Railway Company adjudged to pay it.

In the case of *Morris v. Grand Ave.*, 144 Mo. 500, it was said that:

442 "To entitle the plaintiff in a suit against a railroad for personal injuries to recover for medical services rendered him, he must show either that he has paid for the services or is liable therefor. He cannot recover for a loss he has never sustained; nor for money he is not legally liable to pay."

And in that case it was further said that:

"To authorize a recovery on part of the injured plaintiff, there must have been an actual loss to him of time or money, or a liability that the same may or will occur."

144 Mo. 507.

Or, as said by this Court in *Underhill v. Spencer*, 25 Kan. 71, the liability therefor must have "become fixed and absolute."

In the case of *Chicago v. Honey*, 10 Ill. (App.) 535, it was said that, to entitle the plaintiff to recover for medical attention, she "must show the amount of money actually paid, or that she had become legally liable to pay a certain sum therefor."

McLaughlin v. Ry. Co., 133 Cal. 590.

In this case it affirmatively appears from the findings of the Commissioner that it was mutually understood and agreed between the Mill Company and its attorneys that, in excess of what had been in fact paid, the attorneys were to receive what the Mill Company recovered from the Railway Company, as attorneys' fees, in full of all obligation to the attorneys. Is the liability of the Mill Company for such excess "fixed and absolute"? Suppose that this Court shall,

443 for any reason, hold that the Railway Company is not liable for attorneys' fees. Have the Mill Company's attorneys any cause of action against it for attorneys' fees? Most clearly not. Could not the Mill Company plead, as an absolute defense, the mutual agreement and understanding found by the Commissioner? Then wherein has the Mill Company been damaged? What does the word "damage," as used in the statute signify? Webster defines the word as "Injury or harm to person or property or reputation; an inflicted loss of value; detriment; hurt, mischief." As thus defined, what "damage" has the Mill Company sustained? Are the attorneys' fees not paid, and for which the Mill Company is not liable, in any sense of the word an element of damage?

c. In this state every action must be prosecuted in the name of the real party in interest. (Gen. Stat. 1909, Sec. 5618.)

The Mill Company, as to the attorneys' fees not paid, is not the real party in interest. It has no earthly interest in the relief sought. The action as to these items is being prosecuted in the interest of and for the benefit of Waters & Waters, Charles Blood Smith and John F. Switzer.

In the case of *Baughman v. Nation*, 76 Kan. 672, this Court said that:

"The plaintiff in an action must be the real party in interest. He must have an interest in the subject of the action and the relief sought."

In this case it is established by the finding of the Commissioner that whatever is recovered on these items or claims is to be paid to Waters & Waters, Charles Blood Smith and John F. Switzer, by the Mill Company, and accepted by them "as a full discharge of the liability to them."

Mr. Black, in his Law Dictionary, page 997, defines a real party in interest, within the meaning of this statute, as follows:

"In statutes requiring suits to be brought in the name of the 'real party in interest,' this term means the person who is actually and substantially interested in the subject matter, as distinguished from one who has only a nominal, formal or technical interest in it or connection with it."

The author of the Encyclopedia of Pleading and Practice, Volume 15, at page 710, says:

"The real party in interest, within the meaning of this provision of the Code, is the person who will be entitled to the benefits of the action if successful; one who is actually and substantially interested in the subject matter, as distinguished from one who has only a nominal, formal or technical interest in or connection with it."

Mr. Bliss, in his work on Code Pleading (3d Ed.), note to Section 45, says:

"This raises the question, Who is the 'real party in interest'? The 'real party in interest' is the party who is to be benefited or injured by the judgment in the case. It will be observed that the rule provides the action must be prosecuted in the name of the real party in interest, and of course if the defense can show that the plaintiff or plaintiffs are not the real parties in interest the action must fail."

445 d. Section 723 of Chapter 182, Laws of 1909, page 462, as construed by this Court in McClure vs. Scates, 64 Kan. 284, deprives the defendant of its property without due process of law, and denies to it the equal protection of the law.

Section 723 of Chapter 182, Laws of 1909, as found in the statute book, reads as follows:

"If judgment be given for the plaintiff, he shall recover the damages which he shall have sustained, to be ascertained by the court or jury, or by referees, as in a civil action, and costs; and a peremptory mandamus shall also be granted to him without delay."

As construed by this Court in McClure v. Scates, 64 Kan. 284, it reads as follows:

"SECTION 723. If judgment be given for the plaintiff, he shall recover the damages which he shall have sustained, including necessary outlay for attorneys' fees and expenses, etc."

By the decision of the Court in McClure v. Scates, supra, the words "including necessary outlay for attorneys' fees and expenses" have been written into the statute.

In the case of Ry. Co. v. Minnesota, 134 U. S. 456, it was said that:

"This being the construction of the statute by which we are bound in the present case, we are of opinion that, so constructed, it conflicts with the Constitution of the United States in the particular complained of by the Railroad Company."

446 The Commissioner, in his findings, concludes that:

"That the action for a mandamus was not based upon nor any right sought to be enforced predicated upon any duty of the Pacific Company imposed by a statute of Kansas, or any provision of the Interstate Commerce Act.

That the duty sought to be enforced by mandamus was not a duty imposed, or sought to be imposed, upon the Pacific Company by this Court by its judgment.

That the duty sought to be enforced by the judgment of this Court was a self-imposed duty by the voluntary undertaking of the Pacific Company itself, of furnishing the same and equal facilities to the Mill Company which it at the same time furnished to other persons at the same place similarly situated and conditioned, the common law duty of a common carrier."

The action of the Mill Company was for the purpose of enforcing a private right—"a self-imposed duty by the voluntary undertaking of the Pacific Company itself." The action was in no sense one to enforce the police power of the state, or a police regulation of any kind, as in cases like

R. R. Co. v. Matthews, 58 Kan. 447.

Aff., 174 U. S. 96.

Assur. Co. v. Bradford, 60 Kan. 82.

Fid. Mut. Assur. v. Mettler, 185 U. S. 308.

There is absolutely nothing in the controversy to indicate that the plaintiff in this kind of an action should have greater rights or greater protection than the artisan or the day laborer to enforce a lien for his material or his labor.

In the case of *Atkinson v. Woodmansee*, 68 Kan. 71, this Court, in the most able and exhaustive opinion of Justice Burch, 447 held that Section 5125, General Statutes 1901, was unconstitutional and void, and approved the decision of the Supreme Court of the United States in *Gulf, Colo. & Santa Fe v. Ellis*, 165 U. S. 150. Among other things, Justice Burch said:

"The burden of the law upon them should be as equal and impartial as the law of gravitation, and yet, in the baldest and most arbitrary manner imaginable, this act 'singles out a certain class of debtors and punishes them, when for like delinquencies, it punishes no others. They are not treated as other debtors, or equally with other debtors. They cannot appeal to the courts as other litigants under like conditions, and with like protection. If litigation terminates adversely to them, they are mulcted in the attorney's fees of the successful plaintiff. If it terminates in their favor, they recover no attorneys' fees. It is no sufficient answer to say that they are punished only when adjudged to be in the wrong. They do not enter the courts upon equal terms. They must pay attorneys' fees if wrong. They do not recover any if right, while their adversaries recover if right and pay nothing if wrong. In the suits, therefore, to which they are parties they are discriminated against, and are not treated as others. They do not stand equal before the law. They do not receive its equal protection.' (*Gulf, Colorado*

& Santa Fe Ry. v. Ellis, 165 U. S. 150, 153, 17 Sup. Ct. 255, 41 L. Ed. 666.)

There is, therefore, a perfectly manifest and utterly irreconcilable conflict between the statute and the Constitution. The Constitution is the direct mandate of the people themselves. The statute is an expression of the will of the Legislature. Which shall this court obey?"

Wherever attorneys' fees have been sustained by this Court, the same have been allowed as a penalty.

Ry. Co. v. Mower, 16 Kan. 573.

448 Attorneys' fees are allowed only where there is "malice, gross negligence, oppression, or improper motives."

Winstead v. Hulme, 32 Kan. 573-4.

Here is a controversy between the Mill Company and the Railway Company over an alleged private right. The Mill Company clearly had the right to waive the statutory remedy and sue the Railway Company for damages. In such proceeding, would attorneys' fees and expenses of litigation be considered an element of damage?

In the case of Doom v. Curran, 52 Kan. 360, this Court held that:

"The expenses of the vendee for railway fare and hotel bills while attempting to make a settlement with the vendors cannot be properly included in the damages allowed against the vendors."

Most certainly the "public good" is not involved in this controversy. As a matter of fact, as will hereafter be shown, the Mill Company was operating its mill in violation of positive law, and for the purpose and with the intent of controlling the price of the products of Kansas soil and oppressing the farmers of Kansas.

In the case of Oelrichs v. Spain, 15 Wallace, 230-231, speaking of counsel fees, the Court said that:

"The plaintiff is no more entitled to them, if he succeeds, than is the defendant if the plaintiff is defeated. Why should a distinction be made between them?"

449 And how very pertinent to this case are the reasons assigned in that case for the disallowance of counsel fees. The Court said that:

"In debt, covenant and assumpsit damages are recovered, but counsel fees are never included. So in equity cases, where there is no injunction bond, only the taxable costs are allowed to the complainants. The same rule is applied to the defendant, however unjust the litigation on the other side, and however large the expensalitis to which he may have been subjected. The parties in this respect are upon a footing of equality. There is no fixed standard by which the honorarium can be measured. Some counsel demand much more than others. Some clients are willing to pay more than others. More counsel may be employed than are necessary. When both client and counsel know that the fees are to be paid by the other party, there is danger of abuse. A reference to a master, or an issue to a jury, might be necessary to ascertain the proper amount, and this grafted litigation might possibly be more animated and protracted than that in the original cause. It would be an office of

some delicacy on the part of the court to scale down the charges, as might sometimes be necessary.

We think that the principle of disallowance rests on a solid foundation, and that the opposite rule is forbidden by the analogies of the law and sound public policy."

The court refers to and approves

Arcambel v. Wiseman, 3 Dal. (U. S.) 306.

Day v. Woodworth, 13 How. (U. S. 370-372.

Tess v. Huntington, 23 How. (U. S.) 2.

The Baltimore, 8 Wal. 378.

450 The question was again before the Supreme Court of the United States in the case of Tullock v. Mulvane, 184 U. S. 510-512, and all of the decisions cited supra referred to and approved.

In this case, the question as to the amount of damages the Mill Company had sustained was almost lost sight of before the Commissioner, in an unseemly scramble to magnify the contingent fees claimed by the attorneys, and their expenses. The Mill Company books were forgotten. The Mill Company's employes, who had personal knowledge, were overlooked, and the hearsay testimony of F. D. Larabee relied on.

As said by Justice Burch in the case of Atkinson v. Woodmansee, supra, there is "a perfectly manifest and utterly irreconcilable conflict between the statute (as construed by this Court in McClure v. Scates, supra) and the Constitution." Which shall this Court obey? This controversy being one to enforce a private right, in which the public is not per se interested, and there being no claim for vindictive, exemplary or punitive damages, is not the Railway Company, in this litigation, denied the equal protection of the law? Is it not discriminated against and not treated as the Mill Company? It did not enter this Court upon equal terms with the Mill Company. It must pay attorneys' fees and expenses if wrong. It does not recover any if right. The Mill Company may recover attorneys' fees and expenses if right, and pay nothing if wrong.

The injustice of holding this law constitutional is most forcibly illustrated by the testimony of J. G. Waters. Mr. Waters was asked (Def't's Counter-Abstract, p. 99):

451 "Q. Do they expect to pay you forty thousand dollars?

A. I think they do, because I think they are going to get it from the Missouri Pacific.

Q. But if they don't get it from the Missouri Pacific, do you expect them to pay it?

A. I say, how could I? You wouldn't ask it, Mr. Waggener, * * *

Q. You have said in so many words that you don't expect them to pay that reasonable fee unless they can recoup it from the Missouri Pacific.

A. I simply stated that it was their expectation to recoup from the Missouri Pacific, and pay me a reasonable fee."

It will therefore be seen that the Mill Company was stimulated by the advice of eminent counsel: "You can recoup from the Missouri Pacific Railway Company." "You will not have any attorneys' fees to pay because the Railway Company will pay them." This allure-ment was held out to the Mill Company when the whole matter could have been settled for less than ninety dollars. It is ridiculous, there-fore, to say that the Railway Company was not denied the equal pro-tection of the law. Hundreds of pages of the record are taken up in an attempt to show how much the attorneys have been damaged, and but little effort made to show how much damage in fact the Mill Company has sustained by reason of the interruption of the switching service. If the law is constitutional, then the Mill Com-pany could, with impunity, put the Railway Company to all kinds of expense, knowing that the Company must pay for it.

In this case nine lawyers were employed, viz.: J. G. Waters, John Waters, W. H. Rossington, Charles Blood Smith, John F. Switzer, Clad. Hamilton, Vandiveer & Martin, and C. G. Webb, under 452 advice of J. G. Waters that the Mill Company could "re-coup from the Missouri Pacific"; and this recoupment propo-sition has been reduced to an agreement with the Mill Company that the attorneys for the Mill Company will accept whatever they can get out of the Railway Company for their most extraordinary serv-ices. To allow their claims would be a travesty upon justice, and their insistence for their allowance, under the circumstances, is a strong argument in favor of our contention that the statute is un-constitutional.

The Supreme Court, in *McClure v. Scates*, 64 Kas. 284, holds that the "plaintiff was entitled to recover as damages the necessary outlay for attorneys, as well as for other loss, etc." This decision is not in accord with the decisions of any other court in this country we have been able to find, but is in conflict with the decisions of other states, and, as we have shown, the Supreme Court of the United States.

In the case of *Howell v. Scroggins*, 48 Cal. 355, it was held that, "In an action for an assault and battery, the jury, in estimating the damages, cannot take into consideration the plaintiff's expenses in the prosecution of the suit."

In the case of *Falk v. Waterman*, 49 Cal. 224, it was said that, "In an action for a trespass committed by breaking into the plain-tiff's rooms and destroying property, the jury, in estimating damages, must not take into consideration plaintiff's counsel fees and other ex-penses growing out of the litigation."

453 In the case of *Jacobson v. Poindexter*, 42 Ark. 97, it was said:

"The law makes no allowance to the successful suitor for his time, indirect loss, annoyance or counsel fees. It considers in general the taxed cost as the only damages which a party sustains by the defense of a suit."

Goodbar v. Lindsay, 51 Ark. 382.

Clarke v. Wolfe, 115 Ga. 320.

In the case of *Bull v. Keenan*, 100 Iowa 144, it was said that, "In a suit to set aside a judgment by confession, expenses in-

curring by the plaintiff in the litigation, as attorney's fees, hotel expenses and loss of time, cannot be recovered as damages."

In the case of *Dorris v. Miller*, 105 Iowa 568, it was said:

"We will consider first the plaintiff's appeal. He argues that he should be allowed the amount paid out by him as attorney's fees and costs in securing the removal of the defendant. The general rule is that attorney's fees cannot be recovered from the adverse party and the only question here is, do the facts of this case bring it within any of the exceptions to this general rule? Counsel for appellant make this citation from *Sedgwick, Damages* (5th Ed.), pp. 104-105:

'Where the act complained of is tainted by fraud, malice or insult, the jury which has the power to punish has necessarily the right to include the consideration of the probable counsel fees in their estimate of vindictive or exemplary damages.'

Attorney's fees are not allowed under this rule as compensation, but rather as punishment for defendant's wrongful and malicious act. In other words, they may be considered in awarding exemplary damages. In the case at bar, the plaintiff does not plead malice, nor did he prove such a state of facts as entitles him to recover such damages. There are, it is true, a few cases in which counsel fees are or may be allowed—as in actions on contracts of indemnity, suits for malicious prosecution in some states, actions upon attachment bonds, etc.—but this case does not fall within any of these exceptions. (*Irlbeck v. Bierl*, 101 Iowa 240; *Newell v. Danford*, 13 Iowa 463.) The defendant had the right to petition the Probate Court for appointment as ancillary administrator. Having this right, his motive would not make his conduct actionable. (*Jayne v. Drorbaugh*, 63 Iowa 711.) But if it be conceded that he had no such right, and that his conduct was tortious, yet plaintiff is not entitled to recover attorney's fees paid by him. (*Flanders v. Tweed*, 15 Wall. 450; *Oelrichs v. Spain*, 15 Wall. 211; *Barnard v. Poor*, 21 Pick. 378.)"

The case of *Boardman v. Grocery Co.*, 105 Iowa 451, was a mandamus action in which the petitioner claimed attorney's fees, and for time lost and expenses, and the court said:

"As to actual damages, the rule seems to be that it is only in exceptional cases allowance is made a litigant for time or expenses incurred in prosecuting or defending an action. Liability for the taxable costs is ordinarily considered sufficient punishment for unfounded claim or meretricious defense. The items which appellant claims should be allowed him were incurred in the prosecution of his action, and in an attempt to secure to himself the advantage of a statutory right. The denial of this right did not in itself

cause damage; at least, none is shown. The expense was incurred in an attempt to secure a right, and we know of no rule which will authorize the allowance of such items as damage in a case brought to secure it. If it be true that they are recoverable, then there is good reason for holding that attorney's fees, value of time lost, expenses in attending court, and kindred matters, may be recovered or taxed in any civil action. If anything is well settled, it is that such items can neither be recovered nor taxed. No actual

damages resulting from the denial of appellant's damages can be assessed, no matter how malicious the defendant's conduct. We are convinced, however, that there was no malice, and this should end the inquiry."

In the case of *Eatman v. R. R. Co.*, 35 La. Ann. 1018, it was held: "Attorneys' fees are not recoverable in an action for damages when the act complained of is not tainted by fraud or malice."

In the case of *Barnard v. Poor*, 21 Pick. (Mass.) 382, it was said:

"It is now well settled that, even in an action of trespass, or other action sounding in damage, the counsel fees and other expenses of prosecution of the suit, not included in the taxed costs, cannot be taken into consideration in assessing damages."

In the case of *Henry v. Davis*, 123 Mass. 346, it was said:

"The theory of the law is that the taxable costs awarded to the prevailing party in a suit furnish full indemnity to him for all his expenses incurred in the suit."

456 In the case of *Gates v. Toledo*, 57 Oh. St. 105, the court held that "counsel fees and other expenses paid by a party" were not recoverable.

In the case of *Haverstick v. Gas Co.*, 29 Pa. St. 254, the court held that the "plaintiff cannot recover in damages the expenses of prosecuting a suit on a contract," and could not "recover damages for having to employ counsel to bring the suit."

In the case of *Earl v. Tupper*, 45 Vt. 287, it was held:

"The great weight of authority seems to be opposed to the allowance of counsel fees and other expenses of litigation, beyond taxable costs, as an element of damages, even in cases proper for exemplary damages."

In the case of *Burrus v. Hines*, 94 Va. 414, it was held:

"As a general rule, fees paid to counsel cannot be recovered as damages. If the injury complained of was not wanton or malicious, and exemplary damages are not recoverable, no greater counsel fee can be recovered against the defendant than that prescribed by law to be taxed in favor of the winning party."

In that case it was further said:

"Where parties in good faith differ as to their rights, and resort to law to settle their differences, the law has prescribed what costs shall be taxed, and what shall be therein included as the fee of the winning party. In such case no greater fee should be allowed to be proved or recovered. The litigants should be placed on an
457 equality. If the defendant is successful, it is very clear that he cannot recover from the plaintiff, in addition to the taxable costs, the fee paid by him to his attorneys; nor should the plaintiff, if successful, recover from the defendant the fee he may have paid or incurred to his attorneys."

In the case of *Fairbanks v. Watters*, 18 Wisc. 302, the court said:

"In assessing damages, actual or punitive, the jury cannot take into account the value of services of counsel, or other expenses inci-

dent to the prosecution of the action; and evidence as to the value of such services or amount of such expenses is inadmissible."

In addition, the court said:

"The counsel for the respondent has not referred us to any case which decides that counsel fees, or proper compensation to a lawyer for prosecuting the action, aside from the taxed costs, might be taken into consideration by the jury in assessing damages. On the contrary, the following authorities expressly hold that no claim of that kind is admissible, and that if such items of expense are included by the jury in their verdict, it is irregular and erroneous. *Day v. Woodward et al.*, 13 How. (U. S.) 363; *Barnard v. Poor*, 21 Pick. 378; *Hicks v. Foster*, 13 Barb. 663; *Lincoln v. Schenectady & Saratogaa R. R. Co.*, 23 Wend. 425.

In *Day v. Woodward*, Justice Grier remarks that the doctrine about the right of the jury to include in their verdict in certain cases a sum sufficient to indemnify the plaintiff for counsel fees and other real or supposed expenses over and above taxed costs, seems to have been borrowed from the civil law and the practice of courts of admiralty. He goes on to remark, after giving the origin of
458 costs de incrementis or taxed costs which the successful party was permitted to recover by way of amends for his expense and trouble in prosecuting the action, that the jury neither at common law nor by statute could allow counsel fees and expenses as a part of the actual damages. (Page 372.) The opinions of the court in the other cases are equally emphatic and fully vindicate the soundness of the doctrine that the jury have no right to include in their verdict counsel fees and other expenses of litigation. Nor does it make any difference or change the rule that the action is one where punitive damages may be given. For if the expense of litigation, counsel fees, etc., may be assessed by the jury, it is very clear that it must be upon the principle that they are consequential damages, and relate to the amount of compensation rather than refer to damages which may be inflicted by way of penalty or punishment for aggravated misconduct. The question put was, What in the judgment of the witness was a fair compensation to a lawyer for prosecuting the action? This shows most conclusively that the party rested his claim for counsel fees upon the ground of compensation, recompense or satisfaction for expenses incurred, and not upon the ground that the action was one in which vindictive and exemplary damages might be given."

In the case of *Washburn v. Burke*, 84 Ill. App. 589, it was said:

"An action at law is based upon the state of facts existing when the suit is begun, and claims not then due cannot be properly included in the judgment. When this suit was begun, no attorneys' fees in it had been earned, and there could be no recovery for such
as might be subsequently earned."

459 In the case of *Knefel v. Ahem*, 57 Ill. App. 569, it was said:

"Even when an injunction has been issued the rule is uniform that for counsel fees nothing can be allowed except such as pertained strictly to the injunction; none for the general defense of the suit.

And there is no precedent for allowing damages to a complainant on the ground that enforcing his rights causes him expense."

In the case of *Maisenbacker v. Society*, 71 Conn. 378, it was said:

"The expenses of litigation are not an element of the damages termed in law actual or compensatory damages; 'they are not the natural and proximate consequences of the wrongful act'; and they can only be considered by the jury in those cases in which exemplary damage may be awarded."

In the case of *Mason v. Hawes*, 52 Conn. 12, it was said:

"A jury may not consider plaintiff's expenses beyond his taxable cost in awarding damages, unless the case be one that involves positive culpability on the part of the defendant, and makes it a proper one for exemplary damages."

In the case of *Kelley v. Rogers*, 21 Minn. 147, it was held that,

"The fees of attorneys, and other expenses incurred by the plaintiff in the prosecution of the action, cannot properly be considered by the jury in estimating the damages to be awarded, even in cases proper for the infliction of exemplary damages."

460 In the case of *Spencer v. Murphy*, 6 Colo. App. 453, it was said:

"Attorneys' fees as damages cannot be allowed in the absence of a statute or contract to that effect."

In *McKenzie v. Mitchell*, 123 Ga. 72, it was held that,

"Expenses of litigation are not recoverable by the plaintiff in an action for damages for the mere breach of a contract, when it does not appear that such contract was entered into by the defendant in bad faith, or procured by him by fraud or deceit."

In the case of *R. R. Co. v. R. R. Co.*, 77 Ark. 137, it was said that,

"Attorneys' fees are not ordinarily held to be an element of damage which may be recovered for breach of contract. 42 Ark. 97, 29 Pa. St. 254, 123 Mass. 345. Nor could the parties have had in mind the repayment of attorneys' fees in a suit by the lessor against the lessee for the recovery of possession of the property at the end of the lease, or upon default of payment of rent. This would be a penalty upon the rights of the lessee to litigate. (62 Ark. 225)"

In the case of *Winkler v. Roeder*, 23 Neb. 706, it is held that attorneys' fees are not recoverable as part of compensatory damages.

In the case of *Doom v. Urran*, 52 Kas. 361, it is held that hotel bills and railroad fare should be excluded.

In the case of *Mattlage v. R. R. Co.*, 17 N. Y. Supp. 537, it was held:

461 "We know of no rule of law by which a party can recover from his opponent the counsel fees paid, on the argument of an appeal by way of damages over and above those allowed as costs, except by virtue of an express contract, as when a bond or undertaking has been given or procuring an injunction, attachment, etc. In any other case, if the party chooses to pay more than the amount allowed by law as costs, he must do so at his own expense."

In the case of *Bishop v. Hendrick*, 31 N. Y. Supp. 502, it was held:

"In an action by an administrator to recover personal property of his decedent, he cannot recover as damages fees paid by him to counsel for services rendered in the litigation against the defendant."

In the case of *Clason v. Nassau Ferry Co.*, 45 N. Y. Supp. 675, it was said that,

"The liability of a corporation to pay 'all damages resulting' to a person from the refusal of the corporation to allow an inspection of its stock book (Laws 1892, Ch. 688, Sec. 29) does not include costs and counsel fees of a mandamus proceeding by such person to compel the inspection of the stock book."

In the last cited the court referred to the case of *Bishop v. Hendrick*, 31 N. Y. Supp. 502, and said:

"In the case last cited, damages were claimed under the statute which allows a recovery against an executor de son tort of all damages caused by his act to the estate of the deceased. 2 Rev. St., p. 449, Sec. 17. It was sought to recover the legal expenses of certain actions and proceedings against the defendant for wrongfully
462 withholding property, resisting proceedings for contempt and actions of interpleader, but it was held that they could not be recovered, the court saying:

"The law provides indemnity in the way of costs to be taxed in an action, and, in a proper case, to an additional allowance, to be recovered, by the successful party in the regular proceeding in the action; and while, under the order of reference to which we have referred and under which the referee acted in this case, any damage which, within the ordinary and well settled rules of damages, the plaintiff suffered by reason of the conversion of any of this property, and which, in an action of trover or replevin, might be recovered, was legally allowable under this order in this action. But I know of no rule of law that would include extra counsel fees for legal services, beyond taxable costs and extra allowance given by the Code of Civil Procedure in an action of this character."

The court goes on to distinguish actions upon injunction and attachment bonds, and continues:

"In all these cases, and cases of a kindred character, the damages were awarded upon the express agreement and undertaking on the part of the defendant to pay the same, and both parties acted under and had a right to rely upon the performance of that agreement by the obligers. In the case at bar, while it is apparent that the conduct of the defendant tended greatly to enhance the expense of the plaintiff, there was no undertaking or agreement on the part of the defendant to indemnify the plaintiff further than the plaintiff may ordinarily be indemnified in the successful prosecution of an action, or a series of actions, by the costs and allowance awarded to a successful party in the usual method of practice in actions." Case affirmed in the Court of Appeals on the opinion below. (146 N. Y. 398, 42 N. E. 542.)"

463 It will be noticed that this decision was affirmed by the Court of Appeals. (146 N. Y. 398.)

These decisions are referred to and this Court respectfully asked to reconsider the rule announced in *McClure v. Scates*, supra.

e. If damages, attorneys' fees and expenses of litigation are allowed, this Court is without jurisdiction in this proceeding to allow any amount which accrued subsequent to December 8th, 1906, when the final judgment awarding peremptory writ of mandamus was entered.

The statute under which this proceeding is had provides that (Section 723, Chapter 182, Laws 1909),

"If judgment be given for the plaintiff, he shall recover the damages which he shall have sustained, to be ascertained by the court or jury, or by referees, as in a civil action, and costs, etc."

And by Section 724, Chapter 182, Laws 1909, it is provided that,

"A recovery of damages by virtue of this article against a party who shall have made a return to a writ of mandamus is a bar to any other action against the same party for the making of such return."

Has the court any power, in this proceeding, to extend its investigation as to the damages sustained subsequent to the date of the judgment? The statute gives no such power. No judicial construction of it has been cited as a guide. Neither a literal nor liberal construction will give any such power. To enlarge the
464 statute, as contended for, simply invokes judicial legislation, and would violate the fundamental principle of statutory construction.

It is the settled law of this state that,

"One who claims a right given solely by statute must bring himself fairly within the terms of the statute."

Couroy v. Perry, 26 Kan. 472.

Rodman v. Ry. Co., 65 Kan. 650.

The Supreme Court, in *Gepan v. Stephenson*, 18 Kan. 146, construed the words "shall have been," as contained in a statute, and held that the words "shall have been" belong to the indicative, and not to the potential mood. "They refer to the actual, and not to the possible or permissible."

The Court is now asked to ignore this statute and render judgment, not for the damages which the Mill Company "shall have sustained" at the date of the judgment, but damages sustained subsequent to that date. By the proceedings in error, the judgment was not vacated, but its enforcement merely suspended, and for the damages, if any were sustained, after the date of the judgment, the supersedeas bond was an absolute substitute, under the statute. The damages, if any, accrued under different rights. The damages allowed up to the date of the judgment are statutory damages for failure to perform a duty enjoined by law. After the date of the judgment, the damages, if any, are based upon the obligations of the bond, and are not based upon the statute, nor do they accrue as a result of any statutory requirement.

465 As said by the Supreme Court of the United States:

"The bond and security on the writ cannot be regarded as an idle ceremony. It was designed as an indemnity to the defendant in error, should the plaintiff fail to prosecute with effect his writ of error."

The Legislature never had in contemplation the damages claimed to have accrued after the rendition of the judgment on December 8th, 1906. By the plain letter of the statute, it only had in contemplation the damages which the plaintiff "shall have sustained" at the date of the rendition of the judgment.

It is well settled—indeed, it is fundamental—that a court will not, by construction, enlarge the scope of a statute or extend its operation beyond the plain intention of the Legislature.

In *Shawnee Co. v. Carter*, 2 Kan. 116, it was said that,

"The rule that, 'If an affirmative statute direct anything to be done in a certain manner, that thing shall not, even though there are no negative words, be done in any other manner,' is a rule established on well considered principles."

In *Prouty v. Stover*, 11 Kan. 235, it was said that,

"A statute prescribes a rule of action for the future, and whatever comes within the limits of that rule must be controlled by it, although it may be an act not thought of, or even impossible, at the time of the passage of the law."

466 In *Shattuck v. Chandler*, 40 Kan. 520, it was said that,

"The rule is that where a form of procedure is provided by statute, and the manner of doing a particular thing or not is pointed out, it precludes the doing of it in any other manner or form."

In the case of *State v. Bancroft*, 22 Kan. 170, it was said:

"The cardinal canon of construction, to which all mere rules of interpretation are subordinate, is that the intent, when ascertained, governs."

In the case of *Ayers v. Comm'rs*, 37 Kan. 240, it was said that,

"Where the statute is plain and unambiguous, there is no room left for a judicial construction so as to change the language employed therein."

By the observance of these plain and salutary rules of construction, how can the court consider any evidence of any kind of damage claimed to have accrued subsequent to the date of the final judgment? At a very early date this Court (1 Kan. 273) laid down the law to be that, "The will of the Legislatures, expressed in the statute, is the law," and that will is "to be ascertained by all legitimate methods of interpretation." The damages allowed under the statute are such damages as accrue from neglect to perform a duty enjoined by law. The damages which accrued after the judgment, and when proceedings in error are invoked, are such as accrued from

467 the failure to "prosecute the writ or appeal to effect." The damages in the first class are prescribed and provided for by the statute of Kansas. The damages in the second class are prescribed and provided for by the Federal statute. The Statutes of Kansas make no provision for the ascertainment of the damages, under the Federal statute, in this proceeding, but the plaintiff may (64 Kan. 283) in this "proceeding, and as a part of his remedy, recover such damages as he has actually sustained through the wrongdoing of the defendant." Unmistakably this applies to the damages

which he shall have sustained up to and at the date of the rendition of the final judgment.

The final judgment awarding peremptory writ of mandamus was entered December 8th, 1906. The record will show that, by order of the court, the hearing as to the damages which the Mill Company "shall have sustained" was continued, pending the proceedings in error instituted in the Supreme Court of the United States, and a supersedeas bond was given, as provided by the United States statute. After the judgment of this Court was affirmed by the Supreme Court of the United States an amended claim for damages was filed, setting up damages, expenses and attorneys' fees, etc., which accrued subsequent to the final judgment of this Court, December 8th, 1906. The very large per cent of the damages allowed by the Commissioner accrued after December 8th, 1906, and after the judgment of this Court was superseded by proper undertaking.

The proceedings in error from the Supreme Court of the United States to review the judgment of this Court did not vacate
468 the judgment of this Court of December 8th, 1906. It only suspended its operation pending such proceedings. The question is, therefore, squarely presented: Has this Court jurisdiction to render any different judgment than that it might have entered on December 8th, 1906? Has the Court any jurisdiction to do more than allow such damages as it might have allowed if it had proceeded forthwith to assess the damages at the time it rendered the final judgment awarding the peremptory mandamus? We contend not. The wrongdoing of the defendant was ascertained and merged in the final judgment December 8th, 1906.

In the case of *Price v. Bank*, 62 Kan. 735, it was held that,

"All causes of action upon which suit is brought and judgment obtained are merged in the final judgment, and are thereby extinguished, and cannot be made the foundation of a subsequent action or judgment."

That judgment carried with it the statutory right of the Mill Company to "recover the damages which it shall have sustained" up to that date by reason of the wrongdoing of the defendant, which had been judicially determined by the court; not the damages which it might thereafter sustain as a result of a disobedience of the judgment and mandate of the court, but the damages it had sustained by reason of the refusal of the defendant to perform a duty enjoined upon it by law prior to the rendition of the final judgment. We are not contending that the court did not have the power to render the judgment awarding the writ, and postpone to another date
469 the hearing as to the damages which the Mill Company "shall have sustained" at the date when the judgment was rendered.

But suppose the court, on December 8th, 1906, had proceeded forthwith to ascertain the damage, and had found the amount of damage, and had made such finding a part of the judgment, and thereafter the judgment had been superseded and affirmed, as in this case, would the court have the power, in a supplementary proceeding, or otherwise, to open up the former judgment and enlarge the amount of damages resulting from the delay by reason of the proceedings in error?

What does this Court mean where it says, in *McClure v. Scates*, 64 Kan. 283, that,

"Where a judgment is rendered in favor of the plaintiff in a mandamus proceeding he may, in the same proceeding, and as a part of his remedy, recover such damages as he has actually sustained through the wrongdoing of the defendants?"

In the "same proceeding," and as "a part of his remedy," etc., must have some significance. The Court refers to a "mandamus proceeding," and, as a part of that "proceeding" and as a part of his remedy, the plaintiff may "recover such damages as he has actually sustained through the wrongdoing of the defendant." What "wrongdoing" has the defendant been guilty of, so far as the Mill Company is concerned, since December 8th, 1906? It had a lawful right to institute proceedings in error in the Supreme Court of the United States. This right is guaranteed by the Constitution of the United States. It had a lawful right to suspend the operation of the judgment of date, December 8th, 1906, by giving a proper bond. (See Fed. Judiciary Act, U. S. Comp. St. 1901, Vol. 1, Sec. 1000.) The amount of the bond was prescribed by the Chief Justice of this Court and by him approved. All of these proceedings were taken and had in strict compliance with and conformity to the legal rights of the defendant. In thus delaying the enforcement of the judgment of this Court, wherein was defendant guilty of any "wrongdoing"? It violated no law. It neglected no duty to the Mill Company enjoined upon it, either by law or the judgment of this Court. It was its duty to obey the mandate of this Court, unless the judgment of this Court was superseded as provided by law. What was the "wrong" committed by the defendant which gave the Mill Company the right of action to demand "damages"? It was neglect to perform a duty enjoined by law which resulted in damage. It was "an entire claim arising from a single wrong."

In the case of *R. R. Co. v. Beebe*, 39 Kan. 465, it was held that, "An entire claim arising from a single wrong cannot be divided and made the subject of several suits, however numerous the items of damages may be; a judgment upon the merits of any part will be available as a bar in other actions arising from the same cause."

It was further held in that case that,

"We believe the law to be well settled that no party is permitted to split his causes of action into different suits. If he does, and obtains judgment upon any part, such judgment is a complete bar to a recovery upon any remaining portion hereof. The splitting up of claims is not permitted in case of contracts, and the same rule which prevents a party from doing so applies with equal force to actions arising in tort, and the same act cannot be the foundation for another suit, although the items of damages may be different."

Madden v. Smith, 28 Kan. 801.

Coal Co. v. Brick Co., 52 Kan. 748-9.

Wisler v. Miller, 53 Kan. 515.

Price v. Bank, 62 Kan. 735.

The delay in obeying the mandate of this Court is not and cannot be an element of damage contemplated by the statute. The only damage contemplated by the statute was such as grew out of the wrong in defendant's neglecting to discharge a duty enjoined upon it by law, and to compel which the mandamus proceeding was instituted. The Court is now asked to go beyond the spirit and intent of the statute and assess damages, as for a continuing "wrong," when the "wrong" which afforded the basis for the original "mandamus proceeding" was merged in the final judgment of date December 8th, 1906. Can this be done, unless this Court shall overrule the decision in the case of *K. P. Ry. Co. v. Muhlman*, 17 Kan. 224-228? Since December 8th, 1906, what new act has the company done? What "wrong" has it done to the Mill Company? Nothing. It has made no new invasion of the Mill Company's rights. Superseding the judgment of this Court was not a "wrong," but a lawful right. For the privilege of exercising that lawful right it gave a bond to the Mill Company in the sum of \$20,000, conditioned, as provided by law, that it would prosecute its writ of error to effect, and answer all damages and costs, if unsuccessful.

In the case of *U. S. v. Addison*, 22 How. (U. S.) 185, the court said:

"The bond and security given on the writ of error cannot be regarded as an idle ceremony. It was designed as an indemnity to the defendant in error, should the plaintiff fail to prosecute with effect his writ of error."

U. S. v. Addison, 6 Wal. 292.

As before stated, the "wrong" of the defendant which gave the Mill Company a cause of action was merged in and finally adjudicated by the judgment of December 8th, 1906. The "wrong" was a unit. There could be no division of that unit.

In the case of *K. P. Ry. Co. v. Muhlman*, 17 Kan. 230, *supra*, the court said that,

"Where the original act is unlawful, and an invasion of the plaintiff's rights, the cause of action dates from that act, and a new cause does not arise from new damages resulting therefrom."

The Railway Company, on the 29th day of August, 1906, "refused to further make any transfer of cars over said transfer track." The cause of action then accrued. The rights of the Mill Company were then invaded. If, however, the wrong was a continuing wrong, the action therefor merged in the judgment and thereafter, the defendant, having been guilty of no wrongful act, cannot, in this proceeding, be punished for doing a lawful act.

In this connection we ask the learned counsel for the Mill Company, who have such a large financial interest in the result of this litigation, to point out to the Court what wrongful act—what unlawful act—the Railway Company has been guilty of since the rendition of the final judgment herein, December 8th, 1906.

f. The judgment of December 8th, 1906, was final and terminated the "mandamus proceedings" in this Court.

This Court has original jurisdiction in proceedings in mandamus. It has jurisdiction, in the same proceeding, to ascertain the damage the plaintiff had sustained, but that jurisdiction is confined to the damage which the plaintiff "shall have sustained," growing out of and incident to the wrong of the defendant, which afforded the basis for the remedy invoked by the plaintiff. When that remedy was exhausted by final judgment in favor of the plaintiff, this Court was without jurisdiction to determine and assess damages which accrued subsequent to final judgment. It had jurisdiction to enforce its mandate by proceedings for contempt. If the Mill Company sustained any damage after the original wrong had been merged in a final judgment its remedy therefor must be invoked in another proceeding and before another tribunal.

The cause of action in favor of the Mill Company was the alleged wrong of the defendant. That cause of action was merged in the judgment of December 8th, 1906. That judgment exhausted the power and jurisdiction of the court as to that wrong—that cause of action.

474 In the case of *In re Beck*, 63 Kan. 59, it was said that, "A judgment is the final determination of the issues presented."

The final judgment rendered has not been vacated or modified. The jurisdiction of the court over that judgment has long since terminated. The court now has no power, under the Constitution defining its jurisdiction to graft into that judgment the question of damages alleged to have been sustained since its rendition.

We submit, therefore, that all items of damage which it is alleged accrued since the rendition of the judgment should be stricken out and disallowed.

g. The statute under which damages are claimed does not authorize a recovery for attorneys' fees, expenses and other alleged damages resulting from the proceedings in error from the Supreme Court of the United States.

The Railway Company instituted a proceeding in error in the Supreme Court of the United States against the Mill Company to review and reverse the judgment of this court. The title of that action in the Supreme Court of the United States was "The Missouri Pacific Railway Company, Plaintiff in Error, against The Larabee Flour Mills Company, Defendant in Error." (211 U. S. 612.) A large per cent of the damages allowed is for attorneys' fees and expenses for defending that action in the Supreme Court of the United States, and the same were allowed by the Commissioner as damages sustained by the Mill Company resulting from the wrong

475 of the Railway Company in refusing to do switching service for the Mill Company.

We confidently believe that it is only necessary to call attention of the Court to three decisions of this Court, to demonstrate that such damages cannot be recovered in this proceeding.

K. P. Ry. Co. v. Wood, 24 Kan. 619.

In the case of *West v. Lumber Co.*, 56 Kan. 287, it was said that: "Section 638 of the Code of Civil Procedure, which authorizes the recovery of attorneys' fees in an action brought by an artisan or day laborer to foreclose a mechanic's lien, applies only to the trial court, and does not authorize an allowance for attorneys' fees in this court."

In the case of *State v. Thomas*, 76 Kan. 448-449, it was said that: "Subsequently counsel for the State moved for an allowance for attorneys' fees in this Court. The same question is therefore involved in all of the cases, which is: whether the statute authorizes the allowance of an attorneys' fee in such cases in this Court. Section 1 of Chapter 338, Laws of 1903, reads as follows:

'In case judgment is rendered in favor of the plaintiff in any action brought under the provisions of this section, the court rendering the same shall also render judgment for a reasonable attorney's fee in such action in favor of the plaintiff and against the defendants therein, which attorney's fee shall be taxed and collected as other costs therein, and when collected paid to the attorney or attorneys of the plaintiff therein.'

A similar question arose in *West v. Lumber Co.*, 56 Kan. 287, 43 Pac. 239, which was whether an attorney's fee in this

Court could be allowed in a suit brought by an artisan or day laborer to foreclose a mechanic's lien. The statute construed at that time was Section 638 of the Code of Civil Procedure, which reads as follows:

'In any action brought by any artisan or day laborer to enforce any lien under this act, where judgment be rendered for plaintiff, the plaintiff shall be entitled to recover a reasonable attorney's fee, to be fixed by the court, which shall be taxed as costs in the action.' (Gen. Stat. 1901, Sec. 5125.)

It was held that the provision applied only to the trial court, and did not authorize an allowance for attorneys' fees in this Court. The fact that this section of the statute was subsequently, in *Atkinson v. Woodmansee*, 68 Kan. 71-74, Pac. 640, 64 L. R. A. 325, held to be unconstitutional because it denied persons within the jurisdiction of the state equal protection of the law does not, we think, destroy the force of the former decision as a precedent. The language of the section allowing an attorney's fee in a suit brought by an artisan or day laborer to enforce a mechanic's lien is in all respects similar to that used in the statute under consideration. Each statute provides that where judgment is rendered in favor of plaintiff in an action brought under its provisions, an attorney's fee shall be allowed, which shall be taxed as costs in the action. The question is not discussed in *West v. Lumber Co.*, supra. The opinion merely declares that Section 638 of the Code does not apply to this Court.

The same question was before the Court in *K. P. Ry. Co. v. Wood*, 24 Kan. 619, which was an action to recover damages for stock killed by the railway company. The Act of 1874, under which the action was brought, provided that the owner might recover the full value of the animal killed, together with a reasonable attorney's

fee for the prosecution of the suit, and also that it should
 477 be the duty of the court or jury, where the judgment or
 verdict was in favor of plaintiff, to make a finding of the
 amount allowed for an attorney's fee. A motion was filed by defend-
 ant in error asking the court to tax against the railway company a
 fee for services in this Court. In the opinion it was said:

'On a motion so filed therefor, defendant in error asks us to tax
 against the railroad company an additional amount, as fees of coun-
 sel in this Court. This motion will be overruled. The statute gives
 no attorney's fee for defending actions, and no new judgment is re-
 covered in this Court.' (Page 626.)"

How can the cases cited *supra* be distinguished from this proceed-
 ing? It certainly requires a stretch of the imagination to enlarge
 the word "damage," as used in the statute, to include attorneys' fees
 and expenses in defending a proceeding to reverse the judgment of
 this Court. Such demands have no support in reason, logic or com-
 mon sense, and could never have been in contemplation of the legis-
 lative body which engrafted into the statute the words the "dam-
 ages" which the plaintiff "shall have sustained."

In the case of *Knox v. Knox*, 12 N. H. 352, 358, it was said that:

"The purpose and effect of the review are different where the
 writ of review is instituted by the plaintiff in the original action
 who has failed to sustain his suit, from its object and operation
 when it is brought by a defendant against whom the original plain-
 tiff has obtained judgment. In the first instance it is in effect a
 continuation of the original suit, the plaintiff in review still seeking
 to recover the debt or damages for which he originally commenced
 his action. In the other, although the review rises out of and is de-
 pendent upon the original suit * * * it is in effect a new
 action."

478 A writ of error is a new suit, and hence falls within a
 statute of limitations limiting the time within which actions
 may be brought.

Schroeder v. Merchants, 104 Ill. 71.

Bank v. Jenkins, 107 Ill. 291.

If, therefore, the Mill Company shall be allowed any damages on
 account of or as a result of the suit or action in the Supreme Court
 of the United States, it must be as defendant in that action. In the
 cases under the Stock Law, the Mechanic's Lien Law and the Pro-
 hibitory Law (24 Kan. 619, 56 Kan. 287, 76 Kan. 447, cited *supra*),
 would anyone seriously contend that the trial court would have had
 any power, after the same were affirmed by the Supreme Court, to
 allow additional attorneys' fees for services in the Supreme Court, on
 appeal to that Court.

h. If attorneys' fees for services in defending the action in the
 Supreme Court of the United States, and expenses incident thereto,
 are recoverable at all, the same should be determined by that Court,
 or in a proceeding on the supersedeas bond, and not by this Court.

It is provided by Section 1010, United States Compiled Statutes
 1901, Vol. 1, that:

"Where, upon a writ of error, judgment is affirmed in the Supreme Court or a Circuit Court, the Court shall adjudge to the respondents in error just damages for his delay, and single or double costs, at its discretion."

And Section 1003. *Construed Statutes United States, 1901, Vol. 1, provides that:*

479 "Writs of error from the Supreme Court to a State Court in cases authorized by law shall be issued in the same manner and under the same regulations, and shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States."

Construing these sections, the Supreme Court of the United States, in the case of *Boyce v. Grundy*, 9 Pet. (U. S.) 275, said that:

"It is, therefore, solely for the decision of the Supreme Court whether any damages or interest (as a part thereof) are to be allowed or not in cases of affirmance. If, upon the affirmance, no allowance of interest or damages is made, it is equivalent to a denial of any interest or damage; and the Circuit Court, in carrying into effect the decree of affirmance, cannot enlarge the amount thereby decreed, but is limited to the mere execution of the decree in the terms in which it is expressed."

The question was again before the Supreme Court of the United States in *In re Washington*, 140 U. S. 96-97, and the Court, in expressly affirming *Boyce v. Grundy*, 9 Pet. 275, *supra*, said:

"On receiving the mandate, the court below varied its former decree, and among other things, awarded an additional amount of money intended to be interest upon the original sum decreed from the time of the rendition of the decree in the court below to the time of the affirmance in this Court. This Court, on appeal, after referring to the statute which authorized it, in case of affirmance, to award to the respondent just damages for his delay, and to the rules of this Court made in 1903 and 1907, prescribing an award of damages in cases where the suit in this Court is for mere delay,

480 said: 'It is, therefore, solely for the decision of the Supreme Court whether any damages or interest (as part thereof) are to be allowed or not in cases of affirmance. If, upon the affirmance, no allowance of interest or damages is made, it is equivalent to a denial of any interest or damages; and the Circuit Court, in carrying into effect the decree of affirmance, cannot enlarge the amount thereby decreed, but is limited to the mere execution of the decree in the terms in which it is expressed.'"

The identical question has been decided in the case of *People's Bank v. Aetna Ins. Co.*, 76 Fed. Rep. 550, which holds as follows:

"It will be noted that the reason for the charge of interest on judgment in this case is an appeal dismissed or abandoned, and that it operates as a penalty *pro falso clamore*. This being so, it cannot apply to any cases in this Court. Section 1010, Rev. St. U. S. and Sup. Ct. Rule 23, Subd. 2 (3 Sup. Ct. 13), provides that, in cases before the Appellate Court deserving this judicial condemnation, the court can affix a percentage of damages. This takes the place of any state legislation or practice. As the case at bar has been to

the Appellate Court, and comes back without any such action, this Court cannot impose any penalty or adopt the course pursued by the State Court. The defendant is not entitled to interest on his judgment for costs."

The proceedings in error is the exercise of a statutory right (Sections 999, 1000, 1003, 1010, U. S. Comp. Stat. 1901, Vol. 1), and not by virtue of any procedure authorized by our code. On December 8, 1906, this Court, by its final judgment, determined 481 that the Mill Company was of right entitled to the switching service, and that it was the duty of the Railway Company to furnish it, and awarded its mandate to that effect. The enforcement of that judgment was suspended and delayed, as a result of the supersedeas bond, executed and approved in strict compliance with Section 1000, U. S. Compiled Statutes 1901, Vol. 1, the conditions of which were that the Railway Company should "answer for all damages and costs, etc.," and it was "solely for the decision of the Supreme Court whether any damages" should "be allowed or not in case of affirmance." (140 U. S. 96-97.) The judgment of this Court was affirmed, and on such affirmance, no allowance of damages being made by the Supreme Court of the United States, "it was equivalent to a denial of damage." (140 U. S. 96-97.)

Under the decisions of that Court, what jurisdiction has this Court in this proceeding to award any kind of damages resulting from delay in the enforcement of its judgment? If the failure of the Supreme Court of the United States to allow damages on affirming the judgment is "equivalent to a denial of damage," then its non-action is *res adjudicata*. It certainly will not be claimed that that Court was without jurisdiction, under the express provisions of the Federal Judiciary Act, *supra*. That Court has held that it "solely" had jurisdiction. Notwithstanding the judiciary act, and the decisions cited *supra*, the jurisdiction of this Court is now invoked to render judgment for damages alleged to have accrued, subsequent to the date of its final determination, accruing solely as a result of the delay in the execution of its judgment, made necessary 482 by the supersedeas bond, which suspended for the time being its enforcement. The Mill Company sustained no damage of any kind, subsequent to the date of the judgment, except such as resulted from delay in being able to enforce that judgment, and the Supreme Court of the United States, by Section 1010, *supra*, is vested with exclusive jurisdiction to adjudge to the respondent "just damages for his delay."

i. The attorneys' fees allowed by the Commissioner are unreasonable, and extravagantly unjust.

All of the evidence in the record shows, almost conclusively, that the extravagant demand for attorneys' fees is the result of a conspiracy between the Mill Company and its attorneys, to perpetrate a wrong upon the defendant, because it is a railroad company, and this Honorable Court is asked to give its judicial sanction to the wrong.

This Court will certainly take judicial notice of the issues involved in this case, and of the services performed by the attorneys

before this Court. For such services, J. G. Waters has been paid \$200. As heretofore shown, he fixes the value of such services at \$250, and yet the Commissioner allows him \$2,500. Would this Court, with its knowledge of this case, sustain any such allowance in a suit brought by J. G. Waters against the Mill Company, to recover the reasonable value of his services? Is it the experience of the members of this Court, while at the bar, that it was usual and customary for lawyers in this state to receive any such compensation for their services, as has been allowed Mr. Waters for his services in this case in this Court? If so, the members of this Court cannot be charged with mercenary motives in leaving the bar, and going on the bench.

Then, again, the allowance of \$11,000 for services of attorneys in the Supreme Court of the United States. We trust that our zeal for our client does not induce us to overstep the bounds of propriety in denouncing the allowance as simply absurd, without the slightest justification or foundation therefor. The services of the eminent counsel were of no value to the Mill Company for the reason that the decision of Mr. Justice Brewer was based entirely upon the reasons assigned by Justice Burch in his opinion in this Court, which reasons seem to have been overlooked in their briefs by counsel, who now want \$11,000 for their services. Hence, we say that had they filed no brief and made no argument, the judgment would have been affirmed.

But, aside from all this, was the case of such magnitude, and the issue so important as to justify any such compensation? The Commissioner has, in his report referred to many decisions of the Supreme Court of the United States, and concludes that the attitude of that Court, as shown by such decisions, was such "that it would have seemed reasonably probable that the decision of this Court would be upheld." (Rep., p. 31.) The transcript of the record filed in the Supreme Court of the United States was very short, and required no great labor to examine, and the attorneys all combined do not show that they devoted all together, in the preparation and argument of the case, to exceed sixty days, and for which they have been

allowed \$11,000—or at the rate of over \$60,000 per annum.

Mr. Charles Blood Smith prepared a brief of about sixty pages, and made a twenty-minute argument before the Court at Washington, and for such services demands \$30,000—although he unintentionally neglected to charge on his books \$29,500 of that sum, and has never thought sufficient of it to make any demand of the Mill Company for it, or any part of it, until it is now probably barred by the statute of limitations.

Is there anything in the record to show that the item of \$11,000 is reasonable? In a suit of Waters, Smith and Switzer against the Mill Company, to recover the reasonable value of such services, would any jury—any court—allow any such sum? With what this Court knows of this litigation, and the issues involved, does not the amount allowed strike the Court, at first blush, as not only being excessive, but ridiculous? And, in view of the findings of the Commissioner (Rep., p. 20), are we not justified in denouncing the whole proceed-

ing as a conspiracy, in which the Mill Company is lending its name and assistance to plunder the treasury of the defendant because it is a railroad company?

485

Third.

The Mill Company, being a member of a trust and combination in restraint of trade, and to control the prices of grain and its products, in violation of the laws of Kansas and the Sherman anti-trust act, ought not to be permitted to maintain this action or recover any damages herein.

It is a matter of common knowledge that for the last ten years it has been claimed that there was a combination and trust among the millers of Kansas to monopolize and control the prices of grain and grain products. Farmers have claimed that they were oppressed, and that the product of their labor and their soil was subject to the control and domination of a Millers' Trust—but the evidence of such combination was concealed. Long after the final judgment in this case an action was brought in the District Court of Sedgwick County, in the name of the State of Kansas ex rel. F. A. Jackson against the Southern Kansas Millers' Commercial Club and the members of that club, including one of the Larabees (Rec., Vol. 3, pp. 1157-1158), in which a combination and trust was alleged, and praying for an injunction, which was granted on the 2d day of December, 1908. (Rec., Vol. 3, pp. 1206 to 1208.) Thereafter, in the investigation before the Commissioners in this case, there was developed the most gigantic and remorseless trust and combination which ever cursed the people of this or any other state, and the Larabee Flour Mills Company was one of the chief, if not the chief, conspirator in the whole combination. While the evidence on

486 this subject has been abstracted and will be found in Defendant's Counter-Abstract (pp. 147 to 200), adopted by the Commissioner in his report as correct (Rep., p. 34), yet we invite the attention of the Court to the full record of the evidence. (Rec., Vol. 3, pp. 956 to 1208.) This "Southern Kansas Millers' Commercial Club" was organized in 1904 and continued to exist until in December, 1908, under by-laws the cardinal principle of which was to "live and let live." (Counter-Abst., pp. 147-8.) The record of the transactions of this most iniquitous organization, if published throughout this state, Oklahoma and Texas, would startle the farmers of those states and precipitate a revolt far more serious than that with which Mexico is today confronted.

With this unchallenged record of crime, force, deception and fraud, this Mill Company appeals to this exalted tribunal of justice to award it damages for the interruption of a business prosecuted in violation of the law of this state and of this nation, and for loss of profits which it might have made by oppressing, deceiving and defrauding those who, by their toil, have made this great state what it is today. As a fair sample of the infamous transactions of this association, F. D. Stevens (Larabee's agent and manager), in a letter to the Texas Millers' Association, says (Rec., Vol. 3, p. 1109):

"I regret to advise you that the Texas Star and other Texas mills

have been buying wheat in our territory at from one to three cents above the prevailing prices. I am also advised by a number of our larger mills that unless the Texas mills respect local conditions in buying wheat in this territory that they will retaliate with very low price on flour in Texas. * * * It has been suggested
487 that if all of the Southwestern mills would withdraw from the market for ten or fifteen days that we would be able to accomplish some good."

When the Texas and Oklahoma grain buyers came to Kansas and offered our farmers 3 or 4 cents a bushel more than the "prevailing price" fixed by F. D. Stevens, they were driven out with a threat that flour from the Kansas mills would be dumped into those states, and sold at less than the "prevailing price." And F. D. Stevens advises the secretary of the Texas association that (Rec., Vol. 3, pp. 1087-1088):

"Some of the Texas mills are bidding very high prices yet, but I hope that we will soon get things lined up. We will be all right at this end, and, if you will advise me names of all the mills cutting prices on flour, I will go after them. I am very busy. Yours truly, F. D. Stevens."

When the price of wheat was up, these millers, by concert of action, would destroy the demand by shutting down their mills. The price of flour was fixed in Kansas, Texas and Oklahoma, and it was called the "prevailing price," and all competition thereby destroyed. This enabled the Mill Company to make \$42,000 net from July 1, 1906, to July 1, 1907. The record on this subject is voluminous. The Counter-Abstract (pp. 147 to 200), necessarily, is condensed. The Commissioner has relieved the Court and counsel of much labor by finding that (Commissioner's Report, p. 34):

"I find that the Pacific Company's abstract of the evidence applicable to this question is a fair and full one, and it is adopted as the Commissioner's analysis of the evidence."

488 In the Counter-Abstract it is stated that (Abst., pp. 197-199):

"The evidence of F. D. Larabee, F. S. Larabee and F. D. Stevens, and the minutes of the proceedings of the Southern Kansas Millers' Commercial Club and of the Oklahoma and Texas Millers' Association, and the correspondence passing between the officers of the several associations and the several millers conclusively establishes the fact that, prior to August 1, 1906, and down to January 1, 1909, and since said date, the Larabee Flour Mills Company, and each member thereof, belonged to an organization of which the said F. D. Larabee was manager, for the purpose of creating and carrying out restrictions in trade and commerce, and aids to commerce, and to carry out restrictions in the value and free pursuit of the business of buying and selling grain, and the manufacture and sale of flour and meal by the members thereof, and belonging to such association, and for the purpose of increasing and reducing the price of merchandise, produce and commodities, and to prevent competition in the manufacture, making, transfer, sale and purchase of flour, wheat, grain, and the products

thereof, and to fix a standard or figure whereby the price to the public of wheat, grain, flour and the products thereof should be controlled and established, and that they had entered into and belonged to a combination, as such partners and the Larabee Flour Mills Company, under a contract and agreement, express or implied, by which they bound themselves not to sell, manufacture, dispose of or transport any wheat, meal, grain or flour, or the products thereof, below a common, standard figure, and to preclude a free and unrestricted competition among themselves and others in the transfer, sale and manufacture of wheat, grain, flour and meal, in violation of the laws of the State of Kansas. And further shows and 489 establishes the fact that the said Southern Kansas Millers' Commercial Club, of which the said Larabee Flour Mills Company was a member, and F. D. Stevens, their agent and authorized officer, was its manager, had entered into a combination and conspiracy between the Oklahoma Millers' Association and the Texas Millers' Association, and the members thereof, in violation of the Sherman Anti-Trust Act, and for the purpose of fixing a standard of prices for wheat, flour and meal, and the products thereof, manufactured by the millers in such association. And such evidence further establishes the fact that the said Larabee Flour Mills Company operated its said mill at Stafford, Kansas, during the time covered by the subject-matter of this controversy, from August 1, 1906, to July 1, 1907, and since said date, in combination with the millers in Southern Kansas, for the purpose and with the intent, and under an agreement and understanding, that they would carry out restrictions in the purchase and manufacture of wheat, grain, flour and meal, and the products thereof, and would monopolize the business and prevent competition, all in violation of the laws of the State of Kansas and of the acts of Congress in such cases made and provided."

Notwithstanding the Commissioner adopts the abstract (from pages 147 to 200) as a "full and fair" analysis of the evidence, he finds that there was no combination or trust (Rep., p. 34), and, if there is, the question cannot now be raised, but the defendant is concluded, by the final judgment of December 8, 1906.

It is conceded by the defendant that the final judgment established the wrong of the defendant, and that the judgment as to that issue is *res adjudicata*. The Mill Company is not attempting 490 to recover the damages which it "shall have sustained" by reason of the wrongdoing of the defendant, as provided by the statute it may. The Commissioner holds that if there was such a combination as claimed by the defendant, it had nothing to do with the switching, and would be no defense to the alleged wrongdoing of the defendant. This may all be conceded, and yet, if our premises are correct, may the Mill Company recover damages for the interruption of an illegal business? To illustrate, suppose it should develop in this hearing that the Mill Company, instead of manufacturing flour, was manufacturing beer, and selling it in violation of law. When such facts appeared, would this Court proceed any further to ascertain the amount of damage it had sustained on ac-

count of the interruption of its unlawful business? In other words, will the courts permit themselves to be used to aid a criminal to possess himself of the fruits of his crime? If our premises are correct, the Mill Company, under the Anti-Trust Act, is "denied the right to do any business in this state," and all corporations are "denied the right to handle the goods" of such combination or trust. Undoubtedly, the facts disclosed by this record would have been a defense to the main action, but is the defendant now estopped from presenting the facts to the Court, not as an affirmative defense, but as a reason why the Mill Company should not recover? Under the statute, the peremptory writ having been awarded, the question as to the amount of damages to be awarded becomes an issue to be tried by the court, jury or referee.

491 In the case of *United States v. Trans-Mo. Freight Ass'n*, 166 *United States* 291, the court said that:

"In order to maintain this suit, the Government is not obliged to show that the agreement in question was entered into for the purpose of restraining trade or commerce, if such restraint is its necessary effect."

The Larabees are claiming damages from the defendant Company because that Company neglected or refused to furnish cars with which to transport and ship an article of commerce that was manufactured and sold by the Larabees in violation of both State and National Law.

In the case of *Coppell v. Hall*, 7 *Wall.*, p. 558, it was said that:

"The instruction given to the jury, that if the contract was illegal the illegality had been waived by the reconventional demand of the defendants, was founded upon a misconception of the law. In such cases there can be no waiver. The defense is allowed, not for the sake of the defendants, but of the law itself. The principle is indispensable to the purity of its administration. It will not enforce what it has forbidden and denounced. The maxim, *ex dolo malo non oritur actio*, is limited by no such qualification. The proposition to the contrary strikes us as hardly worthy of serious refutation. Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted with the vice of the original contract, and void for the same

492 reasons. Wherever the contamination reaches, it destroys.

The principle to be extracted from all the cases is that the law will not lend its support to a claim founded upon its violation."

In the case of *Hanauer v. Doane*, 12 *Wall.*, 346-347, the court said:

"In the words of Chief Justice Eyre, in *Lightfoot v. Tenant*, 'the man who sells arsenic to one who he knows intends to poison his wife with it will not be allowed to maintain an action on his contract. The consideration of the contract, in itself good, is there tainted with turpitude, which destroys the whole merit of it. * * * No man ought to furnish another with the means of transgressing the law, knowing that he intended to make that use of

them.' On this declaration Judge Story remarks: 'The wholesome morality and enlarged policy of this passage make it almost irresistible to the judgment; and, indeed, the reasoning seems positively unanswerable.' Can a man furnish another with the means of committing murder, or any abominable crime, knowing that the purchaser procures them and intends to use them for that purpose and then pretend that he is not participator in the guilt? Can he wrap himself up in his own selfishness and heartless indifference and say, 'What business is that of mine? Am I the keeper of another man's conscience?' No one can hesitate to say that such a man voluntarily aids in the perpetration of the offense, and, morally speaking, is almost, if not quite, as guilty as the principal offender."

Addyston Pipe & Co. v. United States, 175 U. S. 211.

Swift & Co. v. United States, 196 U. S. 375.

Smiley v. Kansas, 196 U. S. 447.

Loewe v. Lawlor, 208 U. S. 283-309.

493 The whole question was again considered by the court in the case of Cont'l Wall Paper Co. v. Voight & Sons, 212 U. S. 254-267, in which the court, among other things, said:

"Stated shortly, the present case is this: The plaintiff comes into court admitting that it is an illegal combination whose operations restrain and monopolize commerce and trade among the states and asks a judgment that will give effect, as far as it goes, to agreements that constituted that combination, and by means of which the combination proposes to accomplish forbidden ends. We hold that such a judgment cannot be granted without departing from the statutory rule, long established in the jurisprudence of both this country and England, that a court will not lend its aid, in any way, to a party seeking to realize the fruits of an agreement that appears to be tainted with illegality, although the result of applying that rule may sometimes be to shield one who has got something for which, as between man and man, he ought, perhaps, to pay, but for which he is unwilling to pay.

In such cases the aid of the court is denied, not for the benefit of the defendant, but because public policy demands that it should be denied without regard to the interests of individual parties. It is of no consequence that the present defendant company had knowledge of the alleged combination and its plans or was directly or indirectly a party thereto. Its interest must be put out of view altogether when it is sought to have the assistance of the court in accomplishing ends forbidden by law.

In *Hanauer v. Doane*, 12 Wall. 342, 349, this court said: 'The whole doctrine of avoiding contracts for illegality and immorality is founded on public policy. It is certainly contrary to public policy

494 to give the aid of the courts to a vender who knew that his goods were purchased, or to a lender who knew that his money was borrowed for the purpose of being employed in the commission of a criminal act, injurious to society or to any of its members.'

In *McMullen v. Hoffman*, 174 U. S. 639, 654, 669, where the authorities are reviewed and the whole subject carefully examined, the

court said: 'The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract [citing many English and American cases]. The court refuses to enforce such a contract, and it permits defendant to set up its illegality, not out of any regard for the defendant who set it up, but only on account of the public interest. It has often been stated in similar cases that the defense is a very dishonest one, and it lies ill in the mouth of the defendant to allege it, and it is only allowed for public considerations and in order the better to secure the public against dishonest transactions. To refuse to grant either party to an illegal contract judicial aid for the enforcement of his alleged rights under it tends strongly towards reducing the number of such transactions to a minimum. The more plainly parties understand that when they enter into contracts of this nature they place themselves outside the protection of the law, so far as that protection consists in aiding them to enforce such contracts, the less inclined will they be to enter into them. In that way the public secures the benefit of a rigid adherence to the law.' In that case the principle announced in *Coppell v. Hall*, 7 Wall. 542, 558, was reaffirmed, namely: 'Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted with
495 the vice of the original contract, and void for the same reason. Wherever the contamination reaches, it destroys. The principle to be extracted from all the cases is that the law will not lend its support to a claim founded upon its violation.' "

In this case a peremptory writ of mandamus was awarded, and, under the statute, the question of damages to be awarded the Larabees becomes a separate, independent issue, to be tried by the court, a jury or referee.

In the case of *Sheldon v. Pruessner*, 52 Kas., 589, it was said that: "Perhaps it was not considered because the illegality of the transfer was not specially pleaded in either of the answers, but this was not necessary. The courts, in the due administration of justice, will not enforce a contract in violation of law, nor permit a plaintiff to recover upon a transaction against public policy, even if the invalidity of the contract or transaction be not specially pleaded."

Again the court said that:

"Whatever tends to interfere with the beneficial operation of the statute is unlawful, as against the policy of the law. Whatever tends to obstruct duty by defeating the letter or spirit of the law is also unlawful, and the courts will not enforce any agreement or contract for the benefit of one through whose direction or assistance the law is violated, or public policy contravened. The law attempts to close the doors to temptations by refusing such parties recognition in the courts. (37 Cent. L. J. 313.)

496 No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If, from the plaintiff's own statement or otherwise, the cause of action appears to

rise ex turpi causam or the transgression of a positive law of this country, where the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because it will not lend its aid to such a plaintiff.' (Valentine v. Stewart, 15 Cal. 389; Wilcox v. Ellis, 14 Kas. 588; Gaston v. Drake, 14 Nev. 175; Drexler v. Tyrrell, 15 Id. 114.)"

The Supreme Court of the United States adopted the same principle in the case of *Oscanyan v. Arms Co.*, 103 U. S. 267; speaking of the duty of the court when the illegality of the transaction appears in any manner, said:

"Here the action is upon a contract which, according to the view of the judge who tried the case, was a corrupt one, forbidden by morality and public policy. We shall hereafter examine into the correctness of this view. Assuming for the present that it was a sound one, the objection to a recovery could not be obviated or waived by any system of pleading, or even by the express stipulation of the parties. It was one which the court itself was bound to raise in the interest of the due administration of justice. The court will not listen to claims founded upon services rendered in violation of common decency, public morality, or the law. History furnishes instances of robbery, arson and other crimes committed for hire. If, after receiving a pardon, or suffering the punishment imposed upon him, the culprit should sue the instigator of the crime for the promised reward—if we may suppose that audacity could go so far—the court would not hesitate a moment in dismissing his case and sending him from its presence, whatever might be the character of the defense. It would not be restrained by defects of pleading, nor, indeed, could it be by the defendant's waiver, if we may suppose that in such a matter it would be offered. What is so obvious in a case of such aggravated criminality as the one supposed, is equally true in all cases where the services for which compensation is claimed are forbidden by law, or condemned by public decency or morality."

The Commissioner seems to have overlooked the decision of this Court in the case of *State v. Wilson*, 73 Kan. 350, wherein this Court said that:

"The statute forbids a member of a trust to do any business in the state; that is to say, as properly interpreted, to do any business in promotion of or in pursuance of the purposes of the trust."

Every time the Mill Company shut down its mill to create a demand for flour and lessen the demand for wheat, it was in furtherance of the purposes of the trust. Every pound of flour it manufactured and sold was in subordination to the purposes of the trust. The operation of the mill was under the control of the combination. Its business, under the facts disclosed by the undisputed evidence, was in violation of law, as much as if it had been a gambling house or a saloon. Without the mill and its operation, the Mill Company would not have been a potential factor in the trust. The mill was the instrumentality used by the Mill Company to stifle competition, and that it was so used there is abundant evidence in the record.

498 *a. If, however, the contention of the Commissioner is correct that the defendant is estopped from presenting this question now, because it was not brought to the attention of the Court before the final judgment, that estoppel can only operate up to the date of the final judgment.*

For all damages claimed to have accrued since that judgment, is the defendant estopped from pleading and proving, as an absolute defense, that it is exempt from such damage, because it was prohibited by positive statute from handling the goods of the Mill Company after that date, from the fact that the Mill Company, being a member of the trust, was denied the right to do any business in the state in furtherance of the purposes of the trust? The final judgment of the court of December 8, 1906, would not afford any immunity to the defendant after that date, and it cannot be held liable in damages for refusing to do that, the doing of which would subject it to a criminal prosecution.

In the petition filed by the attorney general in the District Court of Sedgwick County, Kansas, March 7, 1907 (Rec., Vol. 3, pp. 1157-1167), it was fully and specifically charged that the defendants in that action, including the Larabees, were members of the combination and trust; and on December 2, 1908, the court granted a perpetual injunction, as follows, viz.:

“It is therefore considered, ordered, adjudged and decreed by the Court that the defendants be and they are hereby perpetually restrained and enjoined from regulating, fixing, determining
499 or maintaining, by agreement or understanding of two or more of the defendants, the price of wheat, flour, bran, shorts, meal and chop, and from fixing a uniform price for such articles; but the defendants, The Southern Kansas Millers' Commercial Club and the Southwestern Bureau of Information, may preserve their organizations so long as the said organizations are not hurtful or detrimental to free competition in the trade and commerce of wheat, flour, bran, shorts, meal and chop within the State of Kansas. And it is further adjudged that defendants pay the costs of this action.”

Thus it will be seen that the State of Kansas had taken cognizance of this combination, and the judgment of the court establishes the fact that there had been a trust, in violation of the laws of Kansas.

In September, 1905, Stevens (Larabee's agent) wrote to Collett, Texas (Def't's Abst. 182-183): “I assure you that you will have my best efforts in getting our mills (Larabees') to respect your flour prices in quoting flour in Texas.” Again on October 11, 1905, Stevens (Larabee's agent) writes to the same party, among other things: “Some of the Texas mills are bidding very high prices yet, but I hope that we will soon get them lined up. We will be all right at this end, and if you will advise me names of all the mills cutting prices on flour, I will go after them.” The assistant manager of the Association, October 17, 1905, writes a letter (Def't's Abst., p. 190) in which he says: “This bureau of information will work in close connection with the other agencies, establishing a maximum value
500 on wheat each day, and giving this desired information to all its members.” The Larabees write to their agent, F. D. Stevens (December, 1903), that (Def't's Abst., p. 194) “the Claffin

mill is the disturbing element." Again they write to their agent and manager of the association (Deft.'s Abst., p. 196), F. D. Stevens, "We have decided the only thing for us to do to protect our trade is to get right after the price cutters, and do it up brown. * * * What we want is some assurance that those people will be good all the time, and, until we feel satisfied such is the case, we are not going to be good ourselves."

What does all this mean? Innocent amusement? It means that these men were engaged in a violation of law for and on account of which they now ask judicial approval. The Larabee business at Stafford, by his own admission, was an illegal business—a business prohibited by positive law. They were members of a combination and conspiracy which, in its operations, was a curse to the farmers of Kansas. By their combination, they deprived the farmer of the value of his wheat, which fair competition would have secured. F. D. Stevens (Larabees' agent and manager), in a letter to the Texas Millers' Association, says (Rec., Vol. 3, page 1109):

"I regret to advise you that the Texas Star, and other Texas mills, have been buying wheat in our territory at from one to three cents above the prevailing prices. I am also advised by a number of our larger mills that unless the Texas mills respect local conditions in buying wheat in this territory, that they will retaliate with very low price on flour in Texas. * * * It has been suggested that, if all of the Southwestern mills would withdraw from the market for ten or fifteen days, that we would be able to accomplish some good."

501 In November, 1906, Secretary for Oklahoma Topping writes F. D. Stevens (Larabees' agent and manager), "Our wheat prices are out of line for export, and the only solution for us is to curtail our output: shut down our mills to half time or more, if necessary. * * * (Deft.'s Abst. 178.)

Is it possible that, in this enlightened age, and in the face of laws prohibiting such commercial outrages, the men engaged in this gigantic and indefensible conspiracy may flaunt their violation of law in the face of the court, and demand judicial approval by an award of damages for refusal to handle their contraband goods? The statute provides (Sec. 7868, General Statutes 1901) that "all persons, companies and corporations, their officers, agents, representatives and consignees within the state are hereby denied the right to handle the goods of, or in any manner deal with, directly or indirectly, such persons."

In the case of *Mitchell v. Woods*, 17 Kan. 28, the court used language and asked some questions most pertinent here:

"Is he entitled to recover for the loss of the fruits of such wrong? Is he entitled to recover for the loss of the prospective profits of his own intended wrongdoing? Is he entitled to be paid for his own intended wrongdoing? Can he found a right of recovery upon any such intended wrongdoing?"

During all the time covered by this controversy (September 1, 1906, to April 1, 1907) was not the Mill Company, in the prosecu-

tion of its business and in the operation of its mill, not only intending to do wrong, but, in fact, carrying on its business in violation of positive law? If such had not been its purpose, would it have permitted the State of Kansas to obtain an injunction on December 2, 1908, on such a petition as was filed by the Attorney General of Kansas against them? It is simply idle to say the evidence does not show the trust and combination, as alleged by the attorney general. Suppose, after December 8, 1906, the peremptory writ of mandamus had issued, and defendant had been cited to appear before this Court for contempt in not obeying it. Would it not have been a complete answer that the Mill Company was then engaged in an unlawful business and that the defendant, by reason thereof, "was denied the right to handle its goods"? Would the defendant be concluded, by the judgment, from showing that, since its date, the Mill Company was violating the law? If we are correct in this, then as to all damages claimed to have accrued since the date of the judgment, may not the same defense be made?

We respectfully submit that, by reason of these premises, this proceeding should be dismissed at the costs of the Mill Company.

B. P. WAGGENER,
Attorney for Defendant.

503

Supplemental Brief.

Since the preparation of main brief herein, we have received a copy of plaintiff's brief, and some questions are presented not considered in the main brief, which we shall attempt to answer in a short supplemental brief.

First.

As to disallowance of item of \$11,700.00 for loss of profits which it might have realized on corn and corn products.

The abstract of the evidence in plaintiff's brief and abstract is based upon no fact, but is confined exclusively to an expression of opinion as to what the Mill Company could or might have done if it had bought the corn, and if it could have sold it, and if it could have had the switching service, and if it could have found a purchaser for the corn. The Commissioner, after reviewing all the evidence on this subject, said:

"There is no evidence of the price of corn or of corn products during that period, or of the cost of manufacture; nor evidence of the work and profits of other mills of similar character and similarly located as the Mill Company's.

The only evidence being the estimate of witnesses based on the maximum capacity of the mill, and the fact that it was an unusually good corn year, and the fact that the Mill Company had made money in handling corn through their elevator located on the Santa Fe during the same period, and the belief of the witness that the Mill Company could have ground a large amount of corn,

504

and that the view of the conditions it would have yielded a profit of ten cents per hundred pounds.

I conclude that the evidence is too indefinite and uncertain, based too largely upon estimate, opinion and assumption to justify a finding that there was a loss of profit by reason of inability to grind corn, or if there was a loss, how much it amounted to; and I find the claim not proven.

I disallow the fifth claim in toto."

The first claim for damages was \$75.00 per day. (Deft.'s Abst., p. 21.) The second claim was \$100.00 per day. (Deft.'s Abst., pp. 29-30.) Without repeating it here, the attention of the Court is specially directed to the testimony of F. D. Larabee, as contained in defendant's abstract of the evidence. (Deft.'s Abst., pp. 53-64.) This abstract of the evidence has not been challenged by the plaintiffs by any supplemental abstract or otherwise. Under the rules and decisions of this Court, the statements therein contained must therefore be taken as correct.

Ry. Co. v. Conlon, 77 Kan., 324.

The Mill Company produced no books for any preceding year. In fact, they showed that the corn business for the preceding years, since the construction of the mill, had been an unimportant factor in their business. No showing of any kind made or attempted as to the expense of handling corn. No showing of any kind what corn would cost, or what it was worth. In fact, F. D. Larabee testifies that:

"I do not know the price of corn during any of the time
505 covered by the claim for damages account of shutting down
of mill. (Rec., Vol. 2, p. 339.) I cannot tell how much
per hundred we sold corn chops for during time mentioned in this
claim. It is possible we have records to indicate it." (Deft.'s Abst.,
p. 53.)

And yet, in the face of this remarkable admission, Larabee testifies that his damages per day for loss of profits amounted to one hundred dollars; and the Court is seriously asked to consider it.

It has been repeatedly held by this Court that a witness may not give his opinion as to the amount of damage.

Roberts v. Comm., 21 Kan., 253.

In the case of R. R. Co. v. Kuhn, 38 Kan., 677, it was said that:
"A witness should not even be allowed to state his opinion with
reference to the damages to be allowed."

Water Co. v. Knapp, 33 Kan., 753.

"It is simply permitting the witness to answer what only the jury can properly answer."

L. & W. R. R. v. Ross, 40 Kan., 605.

In the case of R. R. Co. v. Wilkinson, 55 Kan., 85, it was said that:
"A witness is not permitted to state his or her opinion with refer-
ence to the damages to be recovered."

The only evidence in the record upon which to base the claim of

506 \$11,700 is the opinion of the witnesses that the loss of profits or damage per day for inability to handle the corn business was One Hundred Dollars. (Deft.'s Abst., pp. 59-60.)

Summarized, the evidence to sustain the claim for profits lost is based upon estimates and guesses, purely speculative and conjectural. Larabees so testify:

"We arrive at \$75 profit each mill day in the corn business by estimating the volume of business we could do and the profit which we knew was in the business at that season. (Deft.'s Abst., pp. 57-8.)

I estimate our loss per day at \$21. (Deft.'s Abst., p. 52; Rec., Vol. 1, p. 21.)

During the thirteen and a half days shutdown we lost nearly \$160 a day profit. (Deft.'s Abst., p. 53.)

Based upon our established business through the preceding years, our profit would have been not less than 10 cents per hundred, and from that up to 15 cents. (Deft.'s Abst., p. 53.)

I do not believe we have any record showing what the average corn business of the mill was. (Deft.'s Abst., p. 54.)

The profit which we lost the thirteen and a half days we were shut down I figure at \$140 per day."

So it will be seen the estimates of profits lost were variable. First, \$21 per day; second, \$75 per day; third, \$140 per day; fourth, \$160 per day.

And then 10 to 15 cents per hundred.

"From the time the mill was constructed down to September 1st, 1906, it was operated comparatively little for corn chops, but principally for flour." (Deft.'s Abst., p. 58.)

507 The estimates of profits were speculative. (Deft.'s Abst., pp. 59-60.) It conclusively appears (Deft.'s Abst., pp. 54, 55, 61) that the net profits of the mill from July 1st, 1906, to July 1st, 1907, were \$42,000—the largest in the history of the mill. Excluding the opinion of J. G. Waters (Deft.'s Abst., p. 188) that the loss was \$24,000, which will certainly not be considered of any probative force, the Larabees have utterly failed to show, by any competent evidence, the slightest loss of profits.

In the case of *Ry. Co. v. Thomas*, 70 Kan., 409, the Supreme Court said:

"Damages recoverable upon breach of a contract are only those that are the direct and proximate result of the wrongful act of which complaint is made.

Damages that are speculative, remote or contingent cannot form the basis of a recovery for the breach of a contract.

Damages for anticipated profits recoverable upon breach of a contract must be established with a reasonable degree of certainty, must be the natural and proximate consequence of the breach, and be free from conjecture and speculation."

The claim of loss of anticipated profits has no preceding year upon which to make a comparison. The attention of the Court is called to the case of *Central Coal & Coke Co. v. Hartman*, 111 Fed., 98-99, in which Judge Sanborn said:

"Compensation for the legal injury is the measure of recoverable

damages. Actual damages only may be secured. Those that are speculative, remote, uncertain, may not form the basis of a lawful judgment. The actual damages which will sustain a judgment must be established, not by conjecture or unwarranted estimates of witnesses, but by facts from which their existence is logically and legally inferable. The speculations, guesses, estimates of witnesses, form no better basis of recovery than the speculations of the jury themselves. Facts must be proved, data must be given, which form a rational basis for a reasonably correct estimate of the nature of the legal injury, and of the amount of the damages which resulted from it, before a judgment of recovery can be lawfully rendered. These are fundamental principles of the law of damages. Now, the anticipated profits of a business are generally so dependent upon numerous and uncertain contingencies that their amount is not susceptible of proof with any reasonable degree of certainty; hence the general rule that the expected profits of a commercial business are too remote, speculative and uncertain to warrant a judgment for their loss. *Howard v. Mfg. Co.*, 139 U. S., 199, 206, 11 Sup. Ct., 500, 35 L. Ed., 147; *Cinn. Siemens-Lungren Gas Illum. Co. v. Western Siemens-Lungren Co.*, 152 U. S., 200, 205, 14 Sup. Ct., 523, 38 L. Ed., 411; *Trust Co. v. Clark*, 92 Fed., 293, 296, 298, 34 C. C. A., 354, 357, 359; *Simmer v. City of St. Paul*, 23 Minn., 408, 410; *Griffin v. Colver* 16 N. Y., 489, 491, 69 Am. D., 718. There is a notable exception to this general rule. It is that the loss of profits from the destruction or interruption of an established business may be recovered where the plaintiff makes it reasonably certain, by competent proof, what the amount of his loss actually was. The reason for this exception is that the owner of a long-established business generally has it in his power to prove the amount of capital he has invested, the market rate of interest thereon, the amount of the monthly and yearly expense of operating his business and the monthly and yearly income he derives from it for a long time before, and for the time during the interruption of which he complains. The interest upon its capital and the expenses of his business deducted from its income for a few months or years prior to the interruption produce the customary monthly or yearly net profits of the business during that time, and form a rational basis from which the jury may lawfully infer what these profits would have been during the interruption, if it had not been inflicted. The interest on the capital and the expenses deducted from the income during the interruption show what the income actually was during this time; and this actual net income, compared with that which the jury infers from the data to which reference has been made, the net income would have been, if there had been no interruption, forms a basis for a reasonably certain estimate of the amount of the profits which plaintiff has lost. One, however, who would avail himself of this exception to the general rule must bring his proof within the reason which warrants the exception. He who is prevented from embarking in a new business can recover no profits, because there are no provable data of past business from which the fact that anticipated profits would have been realized can be legally deduced. 1 Sedgwick Dam-

ages, Art. 183; *Red v. City Council*, 25 Ga., 386; *Kenny v. Collier*, 79 Ga., 743, 8 S. E., 58; *Green v. Williams* 45 Ill., 206; *Hair v. Barnes*, 26 Ill. App., 580; *Morey v. Light Co.*, 38 N. Y., Super. Ct., 185; and one who seeks to recover for the loss of anticipated profits of an established business, without proof of expenses and income of the business for a reasonable length of time before as well as during the interruption, is in no better situation. In the absence of such proof, the profits he claims remain speculative, remote, uncertain and incapable of recovery. In *Goebel v. Hough*, 26 Minn., 252, 258, 2 N. W., 847, 849, the Supreme Court of Minnesota said:

510 "When a regular and established business the value of which may be ascertained, has been wrongfully interrupted, the true general rule for compensating the party injured is to ascertain how much less valuable the business was by reason of the interruption, and to allow that as damages. This gives him only what the wrongful act deprived him of. The value of such a business depends mainly on the ordinary profits derived from it. Such value cannot be ascertained without showing what the usual profits are."

The truth is that proof of expenses and of the income of the business for a reasonable time anterior to and during the interruption charged, or of facts of equivalent import, is indispensable to a lawful judgment for damages for the loss of the anticipated profits of an established business. *Goebel v. Hough*, 26 Minn., 252, 256, 2 N. W., 847; *Chapman v. Kirby*, 49 Ill., 211, 219; 1 *Sedgwick Damages*, Art. 182; *Ingram v. Lawson*, 6 Bing. N. C., 212; *Shafer v. Wilson*, 44 Md., 268, 278."

This decision, and the rule laid down, is supported by the universal current of decisions in this country.

Brockway v. Thomas, 36 Ark., 518.

Martin v. Deets, 102 Cal., 55.

Cooper v. Young, 22 Ga., 269.

Glass v. Garber, 55 Ind., 336.

Ripley v. Mosely, 57 Me., 76.

Casper v. Klipper, 61 Minn., 353.

O'Neil v. Johnson, 53 Minn., 439.

Masterson v. Mt. Vernon, 58 N. Y., 391.

Cin. v. Evans, 5 Oh. St., 594.

Bierdach v. Goodyear Rub. Co., 54 Wisc., 258.

Selden v. Cashman, 20 Cal., 56.

Crabbs v. Koontz, 69 Md., 59.

The following testimony of the Larabees is most interesting in this connection, viz:

511 "Q. Have you any book to show the profit you made per day in the corn business, for the corresponding months, September, October, November and December, 1904 and 1905?

A. The corn profits were not kept separate from the general mill profit.

Q. Have you any book or memoranda to show what profit you made in the corn business, separate and independent from the whole business for the preceding year?

A. No, I think not.

Q. Then that statement is a mere estimate or guess, is it not?

A. Not exactly, because we had some experience in corn business during that season and knew what the profits were.

Q. Didn't you handle some corn independent of the mill?

A. Yes, sir; yes, we handled some from the elevator we owned in the north part of Stafford.

Q. That you had shipping facilities from and to?

A. Yes, sir.

Q. That was never interrupted?

A. No, that was not interrupted.

Q. What kind of corn business did you handle during the months of September, October, November and December, 1906?

A. It is comparatively small, I think, from the elevator.

Q. During that same period of time was not your mill being operated to its full capacity in the flour business?

A. Yes, I think it was.

Q. So that if you had shut down your flour business you might have made \$75 per day in the corn business?

A. Well, I presume we could have operated the corn plant if we had shut down the flour end of the business.

Q. As I understand your statement here, that you did no shipping or grinding of corn or chop because you could not get cars for such business?

A. No, Mr. Waggener, that was occasioned by the fact that we couldn't handle the stuff to and from the mill without the switching service that was denied us.

Q. You could have handled it to and from the mill by
512 hauling it over like you did the flour, could you not?

A. No.

Q. Why?

A. Because we couldn't get it to the loading docks to load it in the wagons.

Q. Could you grind chop and run the mill to its full capacity?

A. Yes, sir.

Q. Did you run the mill to its full capacity during the months of September, October, November and December?

A. I think we did.

Q. And up to the first of April?

A. I think so—well, Mr. Waggener, there was a short time we were shut down, some time in the spring.

Q. That was for repairs?

A. Yes, that was for repairs

Q. But from the first day of September, 1906, to the first day of April, 1907, when that switching service was resumed, so far as the flour output was concerned, the mill was run or operated at its full capacity?

A. No, I won't say that; I stated it was full time, comparatively.

Q. Taking the number of cars you shipped, as shown by this schedule here, it was larger for the months I have spoken of than ever before in the history of the mill, was it not?

A. Well, I rather think it was, my recollection now, I can't absolutely remember.

Q. Now, then, so far as the operation of the mill for the flour purpose was concerned, was operated at its full capacity, comparatively speaking?

A. I think it was.

Q. And the expense incident to enabling you to operate it at its full capacity was the expense incurred in hauling the flour from the mill over to the Santa Fe track, as indicated in your statement here?

A. You mean the extra expense?

Q. Yes.

A. Yes, that was a large part of it.

Q. That was the extra expense?

(No answer.)

Q. Now, for the months of December, 1906, after December 8, 1906, January and February and March, that you hauled over there, the expense, would it be about the same, proportionately, 513 as for the preceding months, September, October and November?

A. Well, I presume so, but that I cannot say; we filed a statement showing exactly what those expenses were, and I cannot recall just what that statement was."

Here it is admitted that, during the period in controversy, the mill was operated to its full capacity in the flour business, which resulted in a net profit for that year of \$42,000.00.

The question was asked (Rec., Vol. 3, p. 1439):

"Q. So that if you had shut down your flour business you might have made \$75 per day in the corn business?

"A. Well, I presume we could have operated the corn plant if we had shut down the flour end of the business."

How much profit per day in the flour business would have been lost had the mill been shut down for that purpose to enable its operation for grinding corn does not appear, except upon the basis of \$42,000.00 net. In the flour business, assuming they operated 365 days, the net profit per day would be about \$115.00, which would have been lost in order to make \$75.00 per day in the corn business.

It seems almost idle to discuss this claim for damage, but counsel seems to be serious because they say the Larabees insist upon presenting it. The decisions referred to by the Mill Company, in support of its contention, have no earthly application to the evidence in this case. There is absolutely not the slightest competent evidence upon which to base the claim for damages for loss of profits. There is no previous year with which to form a comparison.

514 There is no data from which loss of profits can be ascertained, and, if such damages are allowed, they must be upon the theory that Larabee's opinion as to what his profits would have been is to be absolutely controlling, notwithstanding the repeated decisions of this Court, *supra*, to the contrary.

For the purpose of emphasizing the facts heretofore presented,

we again call the attention of the Court to the non-production of the Mill Company's books. There was carried on by this Mill Company a business whose net profits for the year ending July 1st, 1907, were \$42,000.00, which resulted from handling millions of bushels of grain. A business organized with a general manager, assistant general manager, superintendent, foreman, bookkeeper and treasurer—in which it is admitted a complete set of books were kept, showing receipts and disbursements, and showing the number of cars shipped each day and the number of bushels in each car, its destination, and the expenses incurred in loading and unloading, all in minutest detail; and a controversy in which the burden of proof throughout was upon the Mill Company, and yet the only witness called by the Mill Company to prove the facts was F. D. Larabee, who admits that he got his only information from his bookkeeper, who got his information from the books. Is it possible that this Court will allow or sustain any item or claim for damages based solely upon such evidence?

515

Second.

The oft-expressed "modesty" of the attorneys for the Mill Company, to say the least, is most refreshing. They do "protest too much."

On account of Mr. Waters' "modesty," Mr. Houston of Wichita was employed. We assume that it was "modesty" which induced the attorneys to omit Mr. Houston's name from their brief, after he had taken such a conspicuous part in the hearing before the Commissioner. On account of his "modesty," Mr. Waters refrained from testifying as to the value of his services, but he lost control of his "modesty" when he testified that Charles Blood Smith ought to receive \$30,000.00 for writing a brief fifty pages long and making a fifteen-minute argument in the Supreme Court of the United States. Again, he overlooked his "modesty" when he testified that Mr. Switzer ought to have \$5,000.00 for his services in consulting Waters a few times, and for his patience in listening to Captain Waters' office orations.

On account of his "modesty," Mr. Charles Blood Smith would not testify to the value of his services, and would not produce his books before the Commissioner until compelled to do so, which books, when produced, disclosed the fact that Mr. Smith's "modesty" had induced him to charge the Mill Company only \$500.00 for his services. It was Mr. Smith's "modesty" which prevailed upon him not to present claim or make any demand upon the Mill Company for any additional amount, although his services were rendered more than three years ago. It was his "modesty" which prevailed upon

516 Mr. Switzer to state that he "preferred not to testify as to the value of his services," and that induced him not to make any charge on his books against the Mill Company for his services, and never to request any payment for his services, although barred by the Statute of Limitations.

The learned counsel, however, forget their "modesty" in the preparation of their brief when they say (p. 18):

"The Commissioner has seen proper to allow us, as we are impressed, with a very small sum for attorneys' fees."

Whom do they mean by "Us"? Certainly not the Mill Company. Again it is said:

"He allowed John Switzer five hundred dollars, when claim was made for \$5,000, and testimony offered to show that it was worth it. The writer feels the injustice done to Mr. Switzer, and that this allowance ought to be raised considerably."

It is not pretended or claimed that any injustice has been done the Mill Company. All of which demonstrates that the claims presented for attorneys' fees are speculative and contingent, and that the Mill Company is only to account to the attorneys for "whatever may be recovered."

Again, it is said in their brief, after disposing of the injustice done Mr. Switzer, that (p. 19):

"As to the other attorneys engaged in the case, New York lawyers would have had enlarged sums allowed by their courts, and would have expected them. Modestly, the writer cannot say more."

517 It is too bad that the writer of that brief was so handicapped by his "modesty." He should have delegated its preparation to Mr. Houston of Wichita. Again, quoting from the Commissioner's report, to the effect that it is "mutually understood between the Mill Company and the attorneys named that whatever amount is recovered in his proceeding on account of fees and expenses of counsel will be paid by the Mill Company to and accepted by the attorneys as a full discharge of the liability to them," he forgets the handicap of "modesty," and says (p. 19):

"The import of this language is that the sums he has named are simply suggestive to this Court; and if this is so, then there is no real impropriety to suggest to this Court that they should be somewhat increased, and especially to Mr. Switzer."

The writer of this brief does not profess any undue "modesty" which would restrain him in the discussion of these demands for attorneys' fees, but he is handicapped by a superabundance of charity, which persuades him to say no more upon the subject.

518

Third.

The statutes of this state prohibiting trusts, combinations and monopolies were not enacted to encourage oppression and wrong, but to subserve a great public policy, and to protect the farmers of Kansas from such outrages as this Mill Company had promoted and was daily fostering.

It must be conceded—for it cannot be denied—that the Mill Company, in the operation of its mill and in the purchase of grain and the sale of its products, by reason of its connection with and membership in the millers' association, was prosecuting a business which was illegal and in violation of positive law. The only purpose of the combination was to control the prices of grain and grain products. The fact that the Mill Company owned and operated a mill was an indispensable factor in giving them a status of member-

ship in the trust. Such ownership and operation was a condition precedent to qualify it for membership. A banker, a merchant or a farmer was not eligible to membership.

It is provided by Section 5178, Gen'l Stat. 1909, that:

"Every person, servant, agent or employé of any firm or corporation doing business within the State of Kansas that shall conspire or combine with any other persons, firm or corporation within or without the state for the purpose of monopolizing any line of business, or shall conspire or combine for the purpose of preventing the producer of grain, seeds or live stock or hay, or the local buyer thereof, from shipping or marketing the same without the
519 agency of any third person, firm or corporation, shall be deemed guilty of a misdemeanor, and on conviction shall be fined in a sum not less than one thousand dollars and not to exceed five thousand dollars for each offense."

And by Section 5189, Gen. Stat. 1909, it is provided:

"That when an action at law or suit in equity shall be commenced in any court of this state it shall be lawful in the defense thereof to plead in bar or in abatement that the plaintiff or any other person interested in the prosecution of the case is a member or agent of an unlawful combination, as described in Section 1 or 2 of this Act, or that the cause of action grows out of such combination or out of some business or transaction thereof."

The decision of this Court in *Barton v. Mulvane*, 59 Kan. 313, has no application to the facts of this case, except to support, in every particular, our contention. In that case it was in no manner shown that Mulvane was a member of the trust, or had any personal connection therewith. In this case the mill, whose operations, it is claimed, were interrupted, was one of the chief instrumentalities in promoting the unlawful combination and monopoly, and which enabled F. D. Stevens (the Mill Company's paid agent) to say to the millers of Texas: "If you do not keep out of our territory and withdraw your offer to pay the farmers of Kansas 3 cents a bushel more for their wheat than the 'prevailing price' (fixed by us), and paid by our mills, we will have our mill companies send their surplus flour into your territory and put it on the market at less than the
520 'prevailing price' heretofore fixed by your association." It

was the mill in the association which gave F. D. Stevens (Larabee's agent) the power to order a "shutdown" of all association mills, in order to depress the price of grain and increase the demand for the mill product. It was the ownership and operation of the mill in violation of law which compelled the State of Kansas, in March, 1907, to bring a suit against all of these mill owners, to enjoin them from further prosecuting their illegal business, and which suit, in December, 1908, resulted in a perpetual injunction.

Is it possible that the Attorney General of this state—the law-officer of the state—would have taken cognizance of this combination unless he had good grounds for it? Is it possible that a court would have granted a perpetual injunction without evidence to justify it? Is it possible that all of these mill companies would

have submitted to such a judgment unless they knew they were guilty, as charged by the Attorney General? (See petition in record.) And yet, with all this undeniable and unchallenged evidence, this Honorable Court is asked to give a judgment for damages, as a reward for the violation of a law of this state, passed for the purpose of protecting its agricultural interests from the oppression of just such a combination as the Mill Company was a member of and a party to.

But it is contended that the defendant is estopped by failing to plead this defense in the original action. (See answer to this in main brief.) So careful was the Legislature to safeguard the purpose in view that it was provided in Section 5146, Gen. Stat. 1909, that:

521 "Every person, company or corporation within or without this state, their officers, agents, representatives or consignees, violating any of the provisions of this Act within this state, are hereby denied the right and are hereby prohibited from doing any business within this state, and all persons, companies and corporations, their officers, agents, representatives and consignees within this state, are hereby denied the right to handle the goods of or in any manner deal with, directly or indirectly, any such person, company or corporation, their officers, agents, representatives or consignees."

If the contention of the Mill Company is correct as to damages accrued up to the date of final judgment, December 8th, 1906, where is there any estoppel on the part of the defendant in refusing or neglecting "to handle" the goods or merchandise of this combination after the judgment?

We respectfully submit that, upon the whole record, the entire proceeding should be dismissed at the costs of the Mill Company—in which event counsel for the Mill Company will probably not be so anxious to have the Commissioner allowed \$2,500.00.

B. P. WAGGENER,

Attorney for Defendant.

522 Be it further remembered, that afterwards, on the 10th. day of June, A. D. 1911, the same being one of the regular judicial days of the January 1911 Term of the supreme court of the state of Kansas, said court being in session at its court room in the city of Topeka, the following proceeding was had and remains of record in the words and figures as follows, to-wit:

523 In the Supreme Court of the State of Kansas.

No. 15167.

THE LARABEE FLOUR MILLS COMPANY, Plaintiff,

vs.

THE MO. PAC. R'L'Y Co. Defendant.

Journal Entry of Submission.

SATURDAY, June 10, 1911.

Now comes on to be heard the motion of the plaintiff for damages against the defendant herein; and thereupon after oral argument by J. G. Waters, and C. B. Smith for the plaintiff, and by B. P. Waggener for the defendant, said motion is submitted on brief of counsel for both parties and taken under advisement by the court. It is further ordered that the plaintiff have until Wednesday the 14th day of June within which to submit printed abstract of the report and findings of the Commissioner.

524 And afterward, on the 7th. day of July 1911, there was filed in the office of the clerk of the Supreme Court of the state of Kansas, the court's opinion, which is in the words and figures as follows, to-wit:

525

No. 15167.

THE LARABEE FLOUR MILLS COMPANY, Plaintiff,

v.

THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Original Proceeding in Mandamus.

Judgment for Plaintiff for Damages.

Syllabus by the Court.

PORTER, J.:

I.

In original proceedings in mandamus to compel a railway company to furnish transfer services to a shipper judgment was given for the plaintiff and the peremptory writ allowed. Thereupon the defendant sued out a writ of error to the Supreme Court of the United States where the judgment was affirmed. The plaintiff then filed in this court a claim for damages. Held:

1. The Judiciary Act (Rev. Stat. U. S.) was not intended to affect and does not affect the jurisdiction of this court.

2. The jurisdiction of this court in mandamus attaches upon the issuance of the alternative writ, and continues unabated, not only

until the peremptory writ issues but until obedience thereto is enforced.

3. The allowance of the writ of error did not operate to remove the suit from the Supreme Court of the State to the Supreme Court of the United States but merely operated to bring up the record for review.

4. The allowance of the writ of error did not supersede the judgment; the taking of the bond brought about the supersedeas.

5. The damages in mandamus proceedings comprehended by section 723 of the code (Gen. Stat. 1909, Sec. 6319) are the injuries sustained as the natural and probable consequences of the wrongful refusal to comply and the expenses reasonably and necessarily incurred in compelling compliance with the alternative writ, including reasonable attorneys' fees in this court and in the Supreme Court of the United States.

6. Damages incurred prior to the issuance of the alternative writ cannot be recovered.

526 7. Damages for loss of profits may be recovered where the amount of such loss and the fact that it resulted by defendant's refusal to comply with the alternative writ can be determined by the court with reasonable certainty.

8. In such an action where the defendant claims in mitigation of damages that plaintiff might and should have compelled it to furnish cars by serving a written demand and making the cash deposit provided by the statute, the burden rested upon the defendant to show that it stood ready to furnish the service upon such demand.

9. In view of the undisputed character and importance of the litigation, the services performed and the results obtained, the amounts allowed by the commissioner as attorneys' fees for plaintiff's attorney are approved.

10. The defendant claimed that plaintiff was not entitled to recover any damages because during the time the damages arose plaintiff was a member of an organization in violation of the anti-trust laws. Held, that the plaintiff was entitled to recover whatever damages it sustained by the wrongful suspension of the transfer service unless the service sought to be enforced by the mandamus was a necessary part of the purposes of such unlawful trust or combination.

Johnston, C. J., Burch, J., Mason, J., Smith, J., and West, J., concurring.

Benson, J., dissenting as to one item.

A true copy.

Attest:

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,

Clerk Supreme Court.

527 The opinion of the court was delivered by

PORTER, J.:

In this case judgment awarding a peremptory mandamus was rendered December 8, 1906 and the defendant railway company was ordered to resume transfer service for the plaintiff. (*Larabee v. Railway Co.*, 74 Kan. 808). Thereafter defendant sued out a writ of error to the Supreme Court of the United States where the judgment was affirmed. (*Missouri Pacific Ry. v. Larabee Mills*, 211 U. S. 612; 53 L. ed. 352). After the affirmance of the judgment by that court the plaintiff filed here a claim for damages arising out of the defendant's refusal to furnish transfer service covering the period from the suspension of such service August 29, 1906 until it was resumed under the peremptory writ. The Honorable H. C. Sluss was appointed commissioner to take the testimony and report his findings of fact and conclusions of law. The report has been made and a number of exceptions have been filed thereto by the plaintiff and by the defendant.

The plaintiff's principal objection arises over the disallowance of a claim for the loss of profits covering a period of 117 days at \$100 per day and aggregating \$11,700. The basis of this claim is the alleged inability of the mill company to grind corn and market corn products.

The commissioner's findings and his reasons for disallowing the claim are stated as follows:

"I find from the evidence that the mill company's mill is equipped for grinding corn and the production of corn products, and has a maximum capacity of 100,000 pounds of corn per day; that the mill company ground but little corn during the period of the suspension of the transfer service. There is no evidence of the price of corn or of corn products during that period, or of the cost of manufacture; nor evidence of the work and profits of other mills of similar character and similarly located as the mill company's. The only evidence being the estimate of witnesses based on the maximum capacity of the mill, and the fact that it was an unusually good corn year, and the fact that the mill company had made money in handling corn through their elevator located on the Santa Fe during the same period, and the belief of the witness that the mill company could have ground a large amount of the corn, and that in view of the conditions it would have yielded a profit of ten cents per hundred pounds. I conclude that the evidence is too indefinite and uncertain, based too largely upon estimate opinion and assumption to justify a finding that there was a loss of profit by reason of inability to grind corn, or if there was a loss, how much it amounted to; and I find the claim not proven." (p. 14-15).

528 These conclusions are in harmony with settled rules respecting damages for loss of profits and meet with our approval. It is true as said by Judge Brewer in the opinion in *Hoge v. Norton*, 22 Kan. 374, cited by the plaintiff:

"It is not always easy to draw the line between profits that are a legitimate element of compensation, and those that are too remote,

contingent, or uncertain. The old idea that profits were never recoverable was long since exploded; and now, even in actions on contract, it is said that they may be recovered when proximate and certain. 'The general rule is that the party injured by a breach of contract is entitled to recover all his damages, including gains prevented as well as losses sustained, provided they are certain and such as might naturally be expected to follow the breach. It is only uncertain and contingent profits, therefore, which the law excludes.' *Griffin v. Colver*, 16 N. Y. 489." (p. 379).

The difficulty here is, that from the evidence presented the commissioner was not able, nor are we able, to determine with reasonable certainty that any loss of profits was occasioned by reason of plaintiff's inability to grind corn or the amount of such loss, if any.

The commissioner rightly refused to allow any damages to the mill company for losses which it claimed to have sustained by the suspension of transfer service prior to the issuance of the alternative writ, holding that up to that time it was optional with the plaintiff to avail itself of mandamus, or to pursue its remedy in an ordinary action for damages, and that the only power of this court to award damages is by virtue of its jurisdiction in the mandamus

529 proceeding and that such jurisdiction had its inception with the alternative writ. The provision of the code (Sec. 723) authorizing the allowance of damages in mandamus proceedings is: "If judgment be given for the plaintiff, he shall recover the damages which he shall have sustained, to be ascertained by the court or jury, or by referees, as in a civil action, and costs." (Gen. Stat. 1909, Sec. 6319).

McClure v. Scates, 64 Kan. 282.

Objection is made by the defendant to the allowance of certain claims for wages of men and teams in hauling flour, grain and mill stuffs to the Sante Fe tracks and the contention is made that it was the duty of the plaintiff to mitigate its damages by all reasonable means within its reach; and that it was within its power to have compelled the defendant railway company to furnish all the cars needed to reach common points by serving a written demand and making the cash deposit provided by the statute. The commissioner held that the burden of proof was upon the defendant to show that to the knowledge of the mill company the defendant was prepared to furnish and ready and willing to furnish to the mill company promptly on reasonable request such cars as were needed to enable it to deliver its product to common points as promptly and satisfactorily as could be done by shipment over the Santa Fe in the manner the particular shipments were made and that there was a failure of proof on the part of defendant to establish this contention. Upon the statement of the facts the conclusions of the commissioner appear to be sound, and to require no elucidation or comment. The defendant objects to the allowance of this claim, aggregating \$2386.86, on the further ground that the only evidence in support of it was incompetent. We have examined the evidence of the witness Larabee and agree with the commissioner's conclu-

sion that it was not secondary or hearsay, that it was competent and that the objections to its admission were properly overruled.

One of the main controversies is over the allowance of attorneys' fees for plaintiff's attorneys. The ninth claim for the sum of \$2500 for services of Waters & Waters in bringing and prosecuting the mandamus proceeding was allowed, the commissioner finding that mandamus was a proper and necessary proceeding to be instituted by the mill company, that Waters & Waters were employed for that purpose, that they instituted and successfully conducted the same, and that their services were reasonably worth the amount claimed. It is sufficient to say that we approve the finding and the allowance of the claim.

The tenth, twelfth, thirteenth, fourteenth and fifteenth claims are for the professional services and expenses of attorneys employed by the mill company to represent it in the Supreme Court of the United States. The contentions of the defendant respecting these claims are so clearly stated and so fully met and answered by the commissioner that we quote from his report as follows:

"Upon these claims I find, that, following the judgment of this court awarding the peremptory mandamus, the Rly. company caused a writ of error to be issued December 24th, 1906, to the Supreme Court of the United States from said judgment, and on the same day filed a supersedeas bond in this court, which bond was approved by the court, and thereupon the Rly. company filed its petition in error in the Supreme Court of the United States, together with its transcript of the record and of the cause. The Pacific Company presented the following assignments of error:

That the Supreme Court of Kansas erred—

1st. In deciding that the switching service required was not in any part inter-state commerce.

2nd. In deciding that the subject matter of the suit was not governed by the acts of Congress regulating commerce.

3rd. In deciding that the Pacific Company was under obligation to perform the transfer service required of loaded cars destined to points without the State of Kansas.

4th. In deciding that it had jurisdiction to compel the Pacific Company to render the transfer service required in the carriage of property subjects of inter-state commerce destined to points without the State of Kansas.

5th. In assuming jurisdiction of the suit in so far as it involved the carriage of property the subject of inter-state commerce.

6th. In deciding that Chapter 345, Laws of 1905, of Kansas, was not invalid in so far as it attempted to compel the transfer or carriage of property subject to inter-state commerce destined to points without the State of Kansas."

The commissioner finds that these assignments of error and the propositions involved therein "were supported by a masterly and exhaustive analysis of the provisions of the Constitution and the statutes and decisions" bearing upon the subject in the briefs of the defendant's counsel. The report then proceeds as follows:

"It was reasonably necessary for the mill company to employ coun-

sel to represent it in the Supreme Court of the United States of professional standing, learning and experience to adequately combat the contentions and answers and arguments of counsel for the Pacific Company. For this purpose the mill company employed, in addition to Waters & Waters, W. H. Rossington, Charles Blood Smith and John F. Switzer, who were well equipped and qualified to adequately present the case of the mill company to the Supreme Court of the United States. The compensation and expenses of these gentlemen under that employment constitute the ninth, tenth, eleventh, twelfth, thirteenth, fourteenth and fifteenth claims of damages filed by the mill company."

The contentions of the defendant are that these claims cover expenses incurred in the Supreme Court of the United States and not in this court, that the Judiciary Act of the United States (Rev. Stat. U. S. —) deprives this court of all power to allow in this proceeding any damages or expense incurred as a result of the proceeding in error, that the supersedeas bond taken at the time the writ of error was allowed was conditioned that the plaintiff in error should answer all damages and that the only remedy of the mill company was to apply to the Supreme Court of the United States for the allowance of its claim for damages, and that upon the affirmance of the judgment in this case that court did allow to the mill company the sum of \$20.00 as and for its counsel fees in that court.

Again the conclusions of the learned commissioner are so clearly and forcibly stated that we adopt them as a part of our opinion. His language is:

532 "Upon this objection I conclude:

1. That the jurisdiction of this court in mandamus is the creation of the constitution and the statutes of the State of Kansas.
2. That this court is the sole judge of what that constitution and those statutes provide.
3. That the jurisdiction of this court in mandamus over persons within its jurisdiction cannot be affected by act of Congress.
4. That the Judiciary Act does not and was not intended to affect the jurisdiction of this court.
5. That the jurisdiction of this court in mandamus attaches upon the issuance of the alternative writ, and the subject-matter of the proceeding being the awarding a peremptory mandamus, that jurisdiction continues unabated, not only until the writ is awarded, but also until the writ is issued and obedience to it enforced.
6. That the alternative writ is a command of the performance of specified and prescribed duties; and return to the writ is a refusal to perform the duties prescribed; the judgment awarding a peremptory mandamus is a conclusive adjudication that such refusal was wrongful, and the act of the court compelling compliance with the command of the alternative writ.
7. That the damages comprehended by the Kansas statute are the injuries sustained as the natural and probable consequences of the wrongful refusal to comply and the expenses reasonably and necessarily incurred in compelling compliance, with the command of the alternative writ.

8. That the allowance of the writ of error did not operate to remove the suit from the Supreme Court of the State into the Supreme Court of the United States; its only effect was to bring up the record for purposes of review.

9. The allowance of the writ of error did not operate as a supersedeas; the taking the supersedeas bond brought about the supersedeas. The taking the bond, and the supersedeas itself, in so far as it can be conceived of as a substantial act, was the action of the Supreme Court of Kansas.

I conclude that the objection should be disallowed, and a claim for the reasonable compensation of the attorneys mentioned for their services in the case in the Supreme Court of the United States, and their reasonable and necessary expenses, should be allowed as part of the damages sustained by the mill company."

The commissioner also finds that no agreement has ever been made between the mill company and any of its attorneys as to the amount of their compensation, and that the attorneys will claim and accept in full discharge of plaintiff's liability to them whatever amount the court shall determine to be reasonable and allowed as part of the plaintiff's damages. After reciting at some length the character of the service performed by the plaintiff's attorneys in the preparation of their briefs and arguments in answer to the defendant's contentions in the controversy the commissioner concludes from all the evidence that a reasonable allowance for the services of Waters & Waters in the Supreme Court of the United States is the sum of \$5000; and a like sum was allowed for the services of W. H. Rossington and Charles Blood Smith. The attorneys were also allowed their expenses in attending court. To John F. Switzer was allowed \$500 for services in the preparation of briefs.

A number of attorneys well known to the court were called as witnesses by both parties and gave their opinion as to what were reasonable attorneys' fees for the services in question. As usual in such cases there was a wide divergence of opinion expressed. The commissioner found that these opinions were given in answer to two sets of hypothetical questions propounded by the plaintiff and defendant respectively, and without opportunity on the part of the witnesses to give the question of what was really involved in the case a thorough and careful study; and he concludes that none of the witnesses had given the elements of the case such study and consideration as would justify the court in adopting the opinions of any of them as a basis for its judgment. The commissioner, calling to his aid his own general knowledge and professional experience, and considering all the circumstances in evidence, "the character and the importance of the litigation, the labor and time necessarily involved therein and the result of the same," (*Noftzger v. Moffett*, 63 Kan.

354-359) proceeded to find the several amounts which he believed to be reasonable compensation for the services rendered. This he was warranted in doing. The opinions of expert witnesses in such cases are never conclusive upon the court and were not conclusive upon the commissioner. (*Noftzger v. Mof-*

fett, supra; Bentley v. Brown, 37 Kan. 14). The service performed, the character and importance of the litigation and the result obtained thereby, are all conceded; and these elements, as held in Noftzger v. Moffett, supra must be considered by the court, and furnish a sufficient basis upon which to determine what are fair and reasonable amounts to be allowed as compensation for the attorneys. In view of these considerations we are not inclined to disturb the findings of the commissioner or to regard the allowance as excessive or unreasonable.

The claims allowed by the commissioner and approved by the court are as follows:

First Claim—for expense of hauling flour, grain and mill stuffs from mill to Santa Fe tracks.....	\$2,386.85
Second and Third Claims—Wages of men unloading flour transferred by teams.....	1,381.25
Fourth Claim—Loss resulting from closing down of mill thirteen and one-half days.....	1,890.00
Ninth Claim—Waters & Waters, attorneys' fees in this court	2,500.00
Tenth, Twelfth, Thirteenth, Fourteenth and Fifteenth Claims—Attorneys' fees and expenses in Supreme Court of the United States.....	11,480.00
Seventeenth Claim—Larabee's expenses to Topeka...	186.00
Eighteenth Claim—Expenses and per diem of plaintiff and counsel at St. Louis.....	160.00
Twenty-first Claim—F. D. Larabee, attendance on commissioner	30.00
	<hr/>
	\$20,014.10

One further question remains to be considered. The defendant raised the point before the commissioner that the plaintiff is not entitled to recover any damages in this proceeding for the reason that the mill company "during the period in which the damages claimed arose, was a member of the Southern Kansas Millers Commercial Club; that this club was an association of millers, and the object and purpose of it was to control the price of wheat and flour, and prevent competition in the purchase of wheat and in the sale of flour; and that it included in its membership and allied associations substantially all the persons engaged in the milling business throughout Kansas, Oklahoma and Texas; and was an organization in violation of the anti-trust laws of Kansas."

A large amount of evidence was taken which tended strongly to prove this charge, although it was not sufficient to satisfy the commissioner that it had been established. It becomes unnecessary for us to weigh the evidence because of a further finding of the commissioner, which appears to be supported by the evidence, that the performance of the switching service, which was the subject-matter of this action, was no part of the purpose of the organization of the Southern Kansas Millers Commercial Club and in no sense a part of

or necessary to the carrying out of any of the purposes for which the club was organized. Under the authority of *Barton v. Mulvane*, 59 Kan. 317, the plaintiff is entitled to recover whatever damages it has sustained by the wrongful suspension of the transfer service unless the service sought to be enforced was a necessary part of the purposes of some unlawful trust or combination, and unless some violation of the trust law entered into was a part of the cause of action in the original proceeding. To the same effect are:

Bement v. National Harrow Company, 186 U. S. 70.

Connolly v. Union Sewer Pipe Company, 184 U. S. 540.

Loeb v. Columbia Township Trustees, 179 U. S. 472, 479.

Embrey v. Jemison, 131 U. S. 336, 348.

National Distilling Co. v. Cream City Importing Co., 86 Wis. 352, 355.

It follows from what has been said that the report of the commissioner is approved and his findings and conclusions of law are confirmed.

Johnson, C. J., Burch, J., Mason, J., Smith, J., and West, J., concurring.

536 BENSON, J. (Dissenting as to one item):

I concur in the foregoing opinion except that part confirming the report of the commissioner relative to attorneys' fees for services in the Supreme Court of the United States. The commissioner reports: "I find that the Mill Company has incurred a liability to ——— (naming attorney) for professional services in the case on appeal * * * in the sum of — dollars." A similar finding was made (stating name and amount) upon the claim of each of two firms, and one other attorney. Had the plaintiff employed other lawyers findings of a similar nature might have been made as to them also.

The question is not what liability the plaintiff incurred to any attorney or firm of attorneys, nor what number it retained, but the question is what is a reasonable attorneys' fee for necessary services whether performed by one or many attorneys. In my opinion the commissioner should be requested to find and state the amount of a reasonable attorneys' fee for attending to the case for the plaintiff in the Supreme Court of the United States. The evidence reported shows that well-known attorneys of large practice differ in their estimates from \$2500 to \$50,000 for the services in question. In such a situation we should know what the commissioner, who has thoroughly examined every phase of the litigation considers a reasonable fee.

A true copy.

[Seal Supreme Court, State of Kansas.]

Attest:

D. A. VALENTINE,
Clerk Supreme Court.

537 And afterwards, on the 10th day of July, 1911, there was
filed in the office of the clerk of the supreme court of the state
of Kansas, a motion of the defendant for a new trial, which motion
is in the words and figures as follows, to-wit:—

538 In the Supreme Court of the State of Kansas.

No. 15167.

THE LARABEE FLOUR MILLS COMPANY, Plaintiff,
vs.

THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Motion for New Trial.

Now comes the defendant and moves the court to set aside the
report of the Referee, and decision of the Court entered therein
July 7, 1911, and grant a new trial herein for the following reasons
to-wit:

First.

Abuse of discretion on the part of the court whereby defendant was
prevented from having a fair trial.

Second.

Misconduct of the plaintiff.

Third.

Erroneous rulings of the court.

Fourth.

That the report of the Referee and the decision herein was given
under the influence of prejudice.

Fifth.

That the report of the Referee and decision of the court is contrary
to the evidence.

Sixth.

That each item allowed by the Referee and approved by the court
is contrary to the evidence.

Seventh.

That the decision of the court is contrary to law.

B. P. WAGGENER,
Att'y for the Defendant.

July 8, 1911.

539 Endorsed: No. 15167. Larabee Flour Mills Co. vs. Mo.
Pac. Rly. Co. Motion for New Trial. B. P. Waggener, Atty.
for Deft. Filed Jul. 10, 1911. D. A. Valentine, Clerk Supreme
Court.

540 And afterward, on the 31st day of July, A. D. 1911, there was filed in the office of the clerk of the supreme court of the state of Kansas, a petition for a rehearing, which petition is in the words and figures, as follows, to-wit:—

541 Filed July 31, 1911. D. A. Valentine, Clerk Supreme Court.

In the Supreme Court of the State of Kansas.

No. 15167.

THE LARABEE FLOUR MILLS COMPANY, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Petition and Application for a Rehearing.

B. P. Waggener, Attorney for Defendant.

542 In the Supreme Court of the State of Kansas.

THE LARABEE FLOUR MILLS COMPANY, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

May it Please the Court:

This being an original proceeding in this Court, and not being certain as to the proper practice, the defendant, within three days from the date the decision herein was handed down, filed a motion for a new trial, and now, within the rules of the Court, presents this, its petition and application for a rehearing.

If the motion for new trial is the proper practice, we presume the defendant is entitled to make oral argument before the Court, or the judges at chambers. (Sec. 306, Laws 1909, p. 385.)
543 (See also *Humble v. Ins. Co.*, 85 Kan. 140.) And if the Court will indicate that such is the proper practice, proper notice will be served upon the plaintiffs, fixing a date when such motion will be presented in an oral argument to the Court or judges, as may suit their convenience.

A grave injustice has been done in this case, which we hope and believe this Court, as an impartial tribunal, will be willing to correct, if satisfied that the statement is true, and which cannot be shown to a demonstration except by an oral presentation of the motion for a new trial. This being an original proceeding in this Court, and there being no specific rule of the Court on the subject, the defendant invokes its statutory right under the Code (Secs. 305, 306 and 307) and appeals to the Court, under that statute, for an opportunity to present its motion for a new trial, in accordance with

the custom and practice which has prevailed in this state for nearly half a century, since the adoption of the Code.

State v. Summers, 44 Kan. 637.

Larabee v. Hall, 50 Kan. 311.

Smith v. Benton, 54 Kan. 708.

There seems to be no reason why a different rule should be adopted in this case, and certainly the amount involved is sufficiently large to justify the Court in granting to the defendant its legal, statutory rights.

544 *Petition and Application for a Rehearing.*

The defendant here presents its petition and application for a rehearing, and thereon moves the Court to set aside its decision promulgated July 7th, 1911, for the following reasons, viz:

First.

The court, in holding that the evidence of F. D. Larabee was not hearsay and secondary, and therefore not incompetent, overlooked, ignored and wholly disregarded the conceded facts in the case and repeated decisions of this Court.

After the Commissioner had filed his report herein this Court made an order that the plaintiffs should, on or before April 1st, 1911, file with the clerk an abstract of the evidence, and, on or before May 1st, 1911, the defendant should do likewise. The plaintiffs filed an abstract and brief combined, and the defendant, within the time, filed a counter-abstract, and, with its brief, a supplemental abstract. This counter-abstract and supplemental abstract were in no manner challenged. (Sec. 577 of Code.) In this abstract and supplemental abstract it is shown conclusively by F. D. Larabee that he was not testifying from his own recollection or knowledge of the facts, but from information which he got from his bookkeeper, who got his information from the books. (See Brief and Supplemental Abstract,

pp. 10, 16, 17, 25, 26, 27, 29, 30, 31.) There is absolutely
545 nothing in the record to contradict the statement that Larabee was testifying from a statement prepared by his bookkeeper. In fact, the Commissioner states that: "I conclude from this that the witness was using a list from which he testified."

These are the facts. They are not disputed. They are conceded. What is the use of preparing an abstract if it is to be ignored and brushed aside as so much waste paper? Nevertheless the abstract is correctly copied from the transcript, which will verify the abstract.

The Court, in the determination of this question, has disregarded its own decisions repeatedly adhered to in other cases. (See Brief, pp. 12-16.) There can be no question about the applicability of those decisions. They should be controlling. The defendant had a right to rely upon them. The Court does not attempt to distinguish them, but simply ignores them. If decisions of this Court, deliberately made, are to be disregarded, as of no binding effect upon the

Court in analogous cases, it would seem to be useless labor to refer to them.

In the case of *State v. Ry. Co.*, 76 Kan., 501, the defendant company invoked the rule that the Court was bound by the report of the Referee, but the learned justice who wrote the opinion in that case, and also in this, denying the contention of the Railway Company, said that:

"This is an original proceeding in mandamus. We are not bound by the Referee's conclusions, either of fact or of law, as would be the case were the facts found by another court or a jury or referee of another court."

546 This case is an original proceeding in mandamus in this

Court, and, relying upon the rule as above announced, the defendant respectfully asked this Court to apply the same rule to this case, and take the conceded, undisputed and unquestioned facts of the case, and hold that the evidence of Larabee was hearsay and secondary, and therefore incompetent, notwithstanding the conclusion of the Referee to the contrary. But the request of the Railway Company was denied. Why? No reason is given for it, except the mere statement that the evidence was competent. In order to reach this conclusion the Court necessarily disregarded the rule announced in

Manley v. City, 9 Kan. 358;

Kelley v. Stevens, 58 Kan. 569;

R. R. Co. v. Osborn, 58 Kan. 768;

Coder v. Stotts, 51 Kan. 382,

and the many authorities referred to on pages 12 to 17 of the Brief.

The record shows that a stipulation was signed, reserving to each party the right to urge any objection which might have been presented at the time. This stipulation is ignored by the Court, and the defendant held bound by the statement of Larabee that the "statement that was finally filed in the Court was a correct transcript of our expenses from the books."

Again, it conclusively appears that all matters about which he testified were recorded in the books of the firm, which were not offered in evidence, although shown to be in the possession of the

547 Mill Company, in the building where F. D. Larabee testified. The Court attaches no significance to this fact; does not even refer to it, although Larabee repeatedly states that the "list from which he testified" was a correct transcript of the books.

All this leads us to suggest: Is there anything peculiar about this case to justify the Court in treating it in a class by itself? Does the record disclose that the defendant has done any act which justifies a denial to it of those rules of evidence and principles of law many times affirmed by this Court, and successfully invoked by other parties litigant in analogous cases? Every statement of expenses incurred, Larabee testifies, was "honestly prepared by our bookkeeper," and was a "correct transcript of our expenses from our books." Was the failure to produce the books or the bookkeeper a matter of no moment? Does not the evidence of Larabee incontestably show that there was better evidence in his possession which

he could easily have produced? Are the decisions of this Court and others on this subject (see Brief, pp. 18-21) entitled to no weight? It cannot be said that the facts disclosed by the record do not justify our contention that these decisions are controlling, because the facts are not disputed.

Second.

In order to allow the fourth claim, the Referee had to find that the mill was completely "shut down" the days named; whereas it is shown by the record furnished by Larabee that they shipped more cars from the mill on those days than any previous time—
548 and yet the Referee allows, and this Court approves, an item of \$1,890.00 for a complete shut down of the mill on those days, based solely upon the hearsay and secondary evidence of Larabee.

We ask the Court to read pages 29 and 30 of Defendant's Brief and Supplemental Abstract, from which it will be seen that Larabee had a record showing the facts about which he testified, and pages 33-34 demonstrate that the conclusion of the Referee is without any competent evidence to support it, and is absolutely disproved by the facts. On the days of the pretended "shut down" cars were shipped as follows, viz.:

Nov.	1,	1906	.....	3 cars.
Dec.	3,	"	.....	5 "
"	4,	"	.....	5 "
"	24,	"	.....	4 "
"	26,	"	.....	5 "
Jan.	1,	1907	.....	1 "
"	2,	1907	.....	4 "
"	12,	"	.....	5 "
"	28,	"	.....	1 "
Feb.	28,	"	.....	2 "

With these undisputed facts in the record, upon what theory does this Court justify and approve the item of \$1,890.00 for a complete "shut down" of the mill for those days? For the month of December, 1906—which involved five days of the "complete shut down"—they shipped over the Santa Fe 101 cars—more than ever before for one month in the history of the mill (Brief and Supplemental Abstract, p. 28), and yet, in the face of these facts, and in spite of them, this Honorable Court approves an item of
549 damage of \$1,890.00, based upon an alleged "complete shut down" of the mill.

We most respectfully urge that this is manifestly wrong and unjust. It is contrary to the evidence. It is contrary to law, and the only evidence claimed to support it was incompetent.

But, again, some ten pages of brief (see Brief, pp. 29-35) are devoted to a discussion of objections to this item. These objections are not even referred to in the opinion of the Court, notwithstanding it is shown by the record that the Commissioner, in allowing the same, did so without giving any consideration to facts which

were conceded—were undisputed—and which made it utterly impossible for there to have been a “complete shut down” of the mill, which is made the basis for the allowance of the item of \$1,890.00.

Why the Court ignored defendant's brief and oral argument on this item we cannot imagine. Certainly the defendant was entitled to the opinion and judgment of the Court on all of these disputed items. The Commissioner finds that, “by reason of the suspension of the transfer service and the consequent inability to operate the mill during the thirteen and one-half days mentioned, the Mill Company sustained a loss,” etc. This finding is not only not sustained by the evidence, but is directly contrary to the evidence of F. D. Larabee (see Brief and Supplemental Abstract, p. 31), who swears positively that the mill was operated to its full capacity during the months of September, October, November and December, 1906.

550 How is it possible to reconcile this finding of the Commissioner with the evidence of F. D. Larabee—the sole witness on the subject? The number of cars shipped during each day of the alleged “complete shut down,” supplemented with this evidence of F. D. Larabee, ought to be sufficient to challenge the serious consideration and attention of any impartial tribunal.

Third.

After referring to the two items of \$1,027.59 and \$1,359.27 (p. 4 of printed Report of Commissioner), the Commissioner says that:

“To determine justly the amount the Mill Company is entitled to recover on this claim there should be deducted two dollars per car for each car transferred by teams. The evidence does not show the number of cars loaded from teams; nor are the dates given in the evidence sufficient to enable me to form a just estimate of the number.”

In oral argument and Brief (p. 27) this matter was pressed upon the attention of the Court, but, so far as disclosed by the opinion of the Court, it was given no consideration. Notwithstanding the conclusion of the Commissioner that he could not justly allow this claim, under the circumstances, he proceeds to allow it, and this Court approves it.

Did this Court know and realize, when it approved that item, that it did so in the face of a finding by the Commissioner that it would be unjust to allow it? In other words, the Commis-

551 sioner has allowed an item of damage against the defendant for \$2,386.86 after he distinctly found that “to determine justly the amount the Mill Company is entitled to recover on this claim, there should be deducted two dollars per car for each carload transferred by teams,” and thereon finds that there is no evidence “sufficient to enable me to form a just estimate of the number.”

On this subject F. D. Larabee testified (Vol. II, Rec., p. 425) (Supplemental Abst. of Def't, p. 27):

“Q. How many cars of grain, flour or mill stuff did you load on the Santa Fee by teams?

"A. I cannot tell you without referring to the books. I think I can get that."

He admits the evidence was in his possession, but failed to produce it to the satisfaction of the Commissioner, who allowed the item of \$2,386.86, which he finds, without the evidence of the proper reduction of two dollars per car, was unjust.

The defendant filed no answer or counter-claim, for the reason that, on due application for leave so to do, this court would not permit it, but summarily denied the application.

Answer or no answer, the burden of proof on this subject was not upon the defendant, and before the Commissioner, on his own conclusion, could justly determine the amount the Mill Company should receive on such claim, it was incumbent upon it to show the number of cars loaded from teams, and we have shown that it had

552 in its possession books to show such facts, but did not or would not produce them. Nevertheless, by the judgment of this Court, the Railway Company is required to pay an item of damage of \$2,386.86, found by the Commissioner to have been unjustly allowed.

Now that the attention of the Court is again called to this grievous wrong, we cannot but believe that it will withdraw its approval.

Fourth.

Section 723 of Chapter 182, Laws 1909, page 462, as construed by this Court in *McClure v. Scates*, 64 Kan. 284, deprives the defendant of its property without due process of law, and denies to it the equal protection of the law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

This question was presented in the defendant's brief, and some twenty pages devoted to its discussion. It was presented in oral argument, and urged in the utmost good faith. In the opinion filed there is not one word on the subject. The statute of this state provides (Sec. 592, Chap. 182, Laws of 1909, p. 436) that:

"It shall be the duty of the judges of the Supreme Court to prepare and file with the papers in each case full notes of the opinion of the court upon the questions of law arising in the case, etc."

553 The constitutionality of Section 723, Chapter 182, Laws of 1909, was "a question of law arising in the case." It was raised before the Commissioner and presented wherever proper. The transcript of the case is full of objections, upon the ground and for the reason that the law referred to, as construed by this Court, was unconstitutional and void and in conflict with the Fourteenth Amendment to the Constitution of the United States. The same question was presented in printed brief, in as proper and dignified a manner as possible. Our contention was supported not only by former decisions of this Court (68 Kan. 71), but by decisions of other state courts and the Supreme Court of the United States.

Gulf, Colo. & S. F. Ry. Co. v. Ellis, 165 U. S. 150.

The question was one of law, properly and necessarily "arising in the case," and it was made the duty of this Court to file "full notes of the opinion of the Court upon questions of law arising in the case."

Independent of what that opinion might be, the defendant was entitled, as of right, to have the opinion of the Court upon that question. It was one of the important, if not the most important, question in the case. The defendant believed, and still believes, that the presentation of the ridiculous demand for attorneys' fees was the result of a conspiracy between the Larabees and their attorneys to judicially plunder its treasury. The proceedings before the Commissioner give color to the belief.

In the case of *Atkinson v. Woodmansee*, 68 Kan. 71, this Court had decided that a statute allowing to a plaintiff attorneys' fees, and none to the defendant, denied to the defendant the
554 equal protection of the law, and was unconstitutional and void. It was a precedent which the defendant had the right to invoke to protect itself from a threatened outrage—the result of the influence of the distinguished gentlemen who were seeking to reap a rich harvest where they had not sown.

In presenting and urging the unconstitutionality of the Act under which attorneys' fees were claimed, defendant was within its legal rights. It had a right to expect a decision of this Honorable Court upon that question. The question was briefed at length and argued, but the opinion of the Court does not even refer to it. Why? We do not know. If it was an oversight, we now ask the Court to correct that oversight. We think we are right in our contention that the act is unconstitutional. We may be wrong. In any event, we are entitled to know from this Court whether we are right or wrong. The evidence in the record discloses the fact that the Larabees embarked in the litigation and employed many lawyers, acting upon the assurance of the lawyers that the Railway Company would have to pay them their fees if they won, and would not be charged for fees in they lost.

The finding of the Commissioner as to what was the cause of action ought to have been controlling on this Court (see Brief, p. 55), especially in view of the fact that the Court repudiated the rule announced in *State v. Ry. Co.*, 76 Kan. 501, that:

"We are not bound by the referee's conclusions, either of fact or law, as would be the case were the facts found by another court or jury or referee of another court."

555 The Commissioner found that the action for mandamus "was not based upon any right sought to be enforced predicated upon any duty of the Pacific Company," imposed by any state or federal statute, or by the judgment of any court, but upon a self-imposed duty. The element of fraud, "malice, gross negligence, oppression or improper motives" did not enter into the controversy, and this Court has uniformly heretofore held that attorneys' fees are not recoverable in any action to enforce a private right, in the absence of such elements.

Winstead v. Hulme, 32 Kan. 573-4.

It is inconceivable how the Court can hold Section 723, Chapter 182, Laws of 1909, page 462, as not denying to this defendant the equal protection of the laws, without overruling its former decisions on the same subject, and especially the case of *Atkinson v. Woodmanssee*, 68 Kan. 71. Suppose Section 723, supra, had read "that in all actions of mandamus to enforce a private right the plaintiff, on being awarded a peremptory writ, shall recover judgment for his attorneys' fees, railroad fare, hotel bills, theater tickets, etc." Would this Court, or any other court, hesitate to declare such a law unconstitutional and void, within the meaning of the Fourteenth Amendment to the Constitution of the United States? Yet this Honorable Court has, by its decision in this case, written into Section 723, supra, just such a provision, for the damages allowed include all of the foregoing items.

We cannot believe that this Court gave any consideration 556 to the item of \$186.00 allowed by the Commissioner and approved by the Court. This item is referred to not because of the amount involved, but because it serves to illustrate the ridiculous results which will follow the decision of this Court. F. D. Larabee received \$8.00 per day salary from his firm, the Mill Company, and F. S. Larabee the same amount. These men gave certain attention to the litigation, as partners of the company, and their salary went right along. No evidence that the Mill Company was compelled to employ anyone in their places; and yet the Mill Company is allowed \$8.00 per day for their loss of service, as such partners, during the time they were performing service for the Mill Company, their firm, in this litigation.

In an attempt to make a settlement of the controversy Larabee and Waters went to St. Louis. Their railroad fare, hotel bills, Pullman tickets, etc., etc., were used to make up an expense account of \$160.00, which was allowed by the Commissioner and approved by this Honorable Court, and the decision of this Court, disallowing just such a claim, in the case of *Doom v. Curran*, 52 Kan., 360, although specially referred to (Brief, p. 57), apparently overlooked. In fact strange as it may appear, notwithstanding the importance of this case and the large amount involved, this Honorable Court, in disposing of the questions presented, has not seen fit to refer to any decision in support of the disputed items, and has not attempted to discredit or qualify or deny the application of the many decisions referred to by the defendant, which, according to all the rules applicable to precedents, would preclude a recovery.

Again, we call the Court's attention to a most significant 557 fact, viz: The learned counsel for the Mill Company, who are so largely financially interested in the outcome of this case—more so than their clients—have filed no brief in this Court in support of any disputed item allowed by the Commissioner and approved by the Court, and have made no oral argument in opposition to defendant's contention and objection to these items. They have filed no abstract of the evidence on these items, as ordered by the Court, and, in open court, concede the correctness of defendant's abstract; but the Court seems to have taken the Commissioner's findings of

fact and conclusions of law as conclusive and binding upon the Court, and has declined to give the facts and law, as found by the Commisisoner, any independent consideration whatever, although in another case, cited *supra*, this Court, by a unanimous opinion, held that in a case of this character, it was in no manner bound by such findings. In that case the findings and conclusions of the Referee were in favor of the Railway Company. In this case the findings and conclusions are against the Railway Company.

Fifth.

The court also seems to have overlooked the finding of the Commissioner that:

"I find further that it is mutually understood between the Mill Company and the attorneys named that whatever amount is recovered in this proceeding on account of fees and expenses of counsel 558 will be paid by the Mill Company to and accepted by the attorneys as a full discharge of the liability to them."

There can be no other construction placed upon this finding than that the Mill Company, by this agreement and understanding, was relieved of any liability to its attorneys. In other words, it conclusively appears from this finding, and from the evidence, that the Mill Company could not possibly sustain any damages as a result of attorneys' fees for which it was in any manner liable. In view of this finding, this Court has necessarily disregarded its ruling in *Underhill v. Spencer*, 25 Kan., 71, in which it was held that liability for attorneys' fees must have "become fixed and absolute," and also disregarded its construction of the word "damage," in the section under which attorneys' fees are sought to be recovered, to the effect that it meant "necessary outlay for attorneys."

In support of defendant's contention, decisions of most reputable courts in analogous cases were referred to (see Brief, pp. 50-51).

Gulder v. Land, 50 Neb., 868-869;

Morris v. Grand, 144 Mo., 500-7;

Chicago v. Honey, 10 Ill. (App.), 535;

McLaughlin v. Ry. Co., 133 Cal., 590,

and no decision to the contrary has been referred to or can be found. It is utterly impossible for the Court to distinguish the principle decided in these cases from the facts of this case.

559 In *McClure v. Skates*, 64 Kan., 284, this Court held that the plaintiff could recover "as damages the necessary outlay for attorneys, etc." By the opinion filed in this case, approving the findings of the Commissioner, the Court has extended the meaning of the word "damage" in Section 723, Chapter 182, Laws, 1909, to speculation and contingent attorneys' fees, which the plaintiffs have not paid, and for which they are not liable as an element of damage to be recovered by the plaintiffs from the defendant. In other words, this Court has adopted a rule which has been expressly repudiated by every court in this country where the question has been presented.

The overwhelming weight of authority in other states—in fact, there is no contrariety of authority upon the proposition outside of

the State of Kansas—is that the word “damage,” as used in our statute, does not include attorneys’ fees and expenses other than such as are taxable as costs. The contention that it does has been repudiated by the Supreme Court of the United States, and no case can be found where the courts have allowed, as damages, attorneys’ fees, or expenses of litigation other than taxable costs which have not been paid, or a liability incurred therefor. The Supreme Court of Kansas, by its opinion in this case, has announced the startling proposition that the word “damage” includes attorneys’ fees not paid by the plaintiffs, and for which the plaintiffs have incurred no legal liability, solely upon the theory that the attorneys’ fees allowed are reasonable. The payment by the Larabee Flour Mills Company, or its liability, is not made a condition of recovery.

560

Sixth.

The Court is in error in holding that “the damages in mandamus proceedings comprehended by Section 723 of the Code are in the injuries sustained as the natural and probable consequences of the wrongful refusal to comply, and the expenses reasonably and necessarily incurred in compelling compliance with the alternative writ,” including reasonable attorneys’ fees in this Court and in the Supreme Court of the United States.

When the peremptory writ was granted on December 8th, 1906, the alternative writ had spent its force. It was merged in the final judgment.

Price v. Bank, 62 Kan., 735.

No effort was thereafter made to enforce compliance with the alternative writ. The statute (Section 723 of the Code) contemplates no damage after final judgment. (Brief, pp. 72-73.)

Again, we urge upon the Court our contention, heretofore presented (Brief, pp. 78-81), and evidently not considered by the Court, that the defendant, in suing out its writ of error and superseding the judgment, committed no wrong. It violated no statute. It complied with the law literally. The operation of the final judgment rendered by this Court was suspended. The services performed by the attorneys in the Supreme Court of the United States, and expenses incurred, were not for the purpose of “compelling compliance

561 with the alternative writ.” By the judgment of this Court, the defendant, while guilty of no wrong, is to be punished to the extent of \$11,480.00 and more for the exercise in good faith of a plain statutory right. That is the effect of this Court’s decision. By such decision this Court holds that the giving of a supersedeas bond was an “idle ceremony,” and had no significance whatsoever (see Brief, p. 81), except to remove the record into the Supreme Court of the United States for review. This Court, by judicial construction, has amended the Judiciary Acts of Congress, by placing upon the same a construction unsupported by any decision of any court, state or national; by assessing against the Railway Company, in the way of unreasonable and extravagant attorneys’ fees and expenses and other damages, a penalty for exercising a statutory right.

The Court states that the "damages in mandamus proceedings comprehended by Section 723 of the Code are the injuries sustained as the natural and probable consequences of the wrongful refusal to comply, and the expenses reasonably and necessarily incurred in compelling compliance with the alternative writ"; but by what process of logic or reason can it be said that defending the proceedings in the Supreme Court of the United States was an injury sustained as the natural and probable consequence of a wrongful refusal to comply with the alternative writ? Does Section 723 of the Code contemplate any such damage? The wording of the section most clearly indicates the damages which "shall have been sustained" at the date of the final judgment. Stronger or more significant language could not have been used.

562

Seventh.

The Court, by its construction of the Judiciary Act of Congress, denied to the defendant a right, title and immunity specially set up and claimed under Sections 999, 1000, 1003, 1010, Compiled Statutes United States, 1901, Vol. 1, and refused to give full force and effect thereto, and denied to the defendant the rights guaranteed to it by the Fourteenth Amendment to the Constitution of the United States and the laws passed in pursuance thereof.

In order to reach the conclusion which was reached in the decision and judgment of the Court, it must necessarily have decided that the final judgment of December 8, 1906, awarding the peremptory writ of mandamus, was set aside by the supersedeas and the writ of error from the Supreme Court of the United States to this Court, for the reason that the damages approved by this Court, accruing since the date of the judgment, were approved upon the theory that the alternative writ remained in force after the judgment awarding the peremptory writ. In other words, the Court holds that, while the proceedings were pending in the Supreme Court of the United States, the alternative writ remained operative and effective, notwithstanding the final judgment awarding the peremptory writ.

Is it possible that such can be the law? Our understanding of the law has been, and no authority to the contrary can be found, that a final judgment in any controversy merged all issues and antecedent matters involved. (See Brief, pp. 79-80.) This Court now

563 holds that this is not the law, and awards damages for a disobedience of the alternative writ, after it had spent its force and become merged in the final judgment. The Commissioner, by whose findings and conclusions the Court concludes it is bound, refers to no precedent to sustain his conclusion, and the counsel for themselves, or their clients, have found no precedent to sustain such an anomalous and unheard of proposition; and this Court contents itself by approving the conclusions of the Commissioner, without any independent investigation, for it refers to no precedent to sustain it, and there is none.

The Supreme Court of the United States, in construing the Judiciary Act of Congress, invoked by the defendant, holds that "the bond and security given on the writ of error cannot be regarded as an

idle ceremony. It was designed as an indemnity to the defendant in error, should the plaintiff fail to prosecute with effect his writ of error."

U. S. v. Addison, 22 How. (U. S.), 185.

This Honorable Court, however, disregards, without comment, the construction of the Judiciary Act by the Supreme Court of the United States in *Boyes v. Grundy*, 9 Pet. (U. S.), 275, and *In re Washington*, 140 U. S., 96-97 (see Brief, p. 88), and proceeds to hold that "the Judiciary Act was not intended to affect, and does not affect, the jurisdiction of this Court"; and the only reason given for such holding is that the Court feels bound by the findings of the Commissioner. The Commissioner concludes, and the Court thereon con-

cludes, that "the jurisdiction of this Court in mandamus at-
 564 taches upon the issuance of the alternative writ, and continues unabated, not only until the writ issues, but until obedience thereto is enforced." As an abstract proposition this is true, but there is no reasonable construction of Section 723 of the Code, *supra*, which confers upon this Court jurisdiction to render judgment for damages accruing for disobedience of the alternative writ after final judgment awarding the peremptory writ. The proceedings in error were from the final judgment, and not from the alternative writ. The writ of error and supersedeas bond did not suspend the alternative writ. That writ was suspended by and merged in the final judgment of this Court. What did Congress mean by the Judiciary Act? The Commissioner says (and the Court approves) that the "allowance of the writ of error did not supersede the judgment; the taking of the bond brought about the supersedeas." What difference does it make? The judgment of this Court was superseded by force of the Judiciary Act. (See Brief, pp. 88-89.) This the Court is compelled to concede, but, in order to have any excuse for allowing attorneys' fees in the Supreme Court of the United States for defending the proceedings there, the Commissioner wiped off of the statute book the Judiciary Act of Congress, and apparently this Court, without giving the subject any independent investigation or consideration, approves it.

This defendant has not contended, and does not contend, that the Judiciary Acts of Congress deprived this Court of its jurisdiction in mandamus, but it does contend—and no precedent to the contrary can be found—that after final judgment of this Court was superseded by writ of error and bond, as provided by the Judiciary
 565 Act of Congress, the operation of such final judgment was suspended, and this Court was deprived of all jurisdiction of the controversy, while pending in the Supreme Court of the United States. This Court, however, by its decision—or rather by the decision of the Commissioner approved by the Court—has amended by construction the Judiciary Act of Congress by placing upon it a construction never before heard of by bench or bar since its enactment.

It is provided by Section 1010, United States Compiled Statutes, 1901, Vol. 1, that:

"Where, upon a writ of error, judgment is affirmed in the Supreme Court or Circuit Court, the court shall adjudge to the respondent in error just damages for his delay, and single or double costs, at its discretion."

And by Section 1003, Compiled Statutes 1901, Vol. 1, said Section 1010 is in all respects made applicable to "writs of error from the Supreme Court to the state courts," etc. (See Brief, pp. 87-88.) Construing these sections, the Supreme Court of the United States has said that:

"It is therefore solely within the decision of the Supreme Court whether any damages or interest (as a part thereof) are to be allowed or not in cases of affirmance. If, upon the affirmance, no allowance of interest or damages is made, it is equivalent to a denial of any interest or damage."

Boyes v. Grundy, 9 Peters (U. S.) 275.

And this construction of these sections by the Supreme Court of the United States was affirmed in *In re Washington*, 140 U. S. 96-97, and concurred in by the Federal Court in the case of *People's Bank v. Aetna Ins. Co.*, 76 Fed. 550.

The Commissioner, however, holds that this construction placed upon these statutes by the Supreme Court of the United States is not the law, and his conclusion is approved by this Court; and therefore it necessarily follows that the right and immunity invoked by the defendant in this proceeding, as given and guaranteed to it by the Judiciary Acts of Congress and as construed by the Supreme Court of the United States, is denied and wholly disregarded; and the Commissioner (approved by the Court) has written into the sections of the Judiciary Act referred to a construction never contemplated by Congress, or approved by the Supreme Court of the United States, and has adopted a construction of such acts which imposes a penalty upon a party litigant who has the temerity to question a judgment of this Court in a mandamus proceeding by writ of error in the Supreme Court of the United States, by compelling such party to pay damages, including attorneys' fees, hotel bills, railroad fare, Pullman car fare and theater tickets, as an element of damage provided by Section 723 of the Code of Civil Procedure of this state.

From the opinion filed in the court by Mr. Justice Porter, it would seem apparent that this Court has approved such unheard of conclusions of the Commissioner only and solely because they were made by the Commissioner in this case. There appears to have been no independent investigation or consideration of this question—one fairly presented by the record—but the Court contents itself by simply copying the report of the Commissioner, and approving
567 it as sound. The Commissioner, in his report, prepared an elaborate brief in support of plaintiff's claim for attorneys' fees, but no such brief seems to have been prepared on this proposition.

We respectfully ask the Court to take up this question, and determine whether or not the Supreme Court of the United States was wrong in the construction which it has placed upon these statutes,

and which evidently apply to this proceeding. It would seem that the Commissioner reached the conclusion that these statutes did not apply because this was a mandamus proceeding. There appears to be no reason for distinguishing proceedings in error from the Supreme Court of the United States in this case from any other proceedings in error, but the conclusions of the Commissioner are based upon the ground that this is a mandamus proceeding, and, therefore, parties are relieved from the operation of the Judiciary Act of Congress referred to. If the Commissioner and the Court had given the force and effect to the Judiciary Act of Congress as claimed by the defendant, and as justified by the repeated decisions of the Supreme Court of the United States, no judgment could or would have been rendered by this Court for any damages allowed, which accrued after the Supreme Court of the United States acquired jurisdiction of the controversy under those Acts.

568

Eighth.

The item of \$2,500.00 allowed for services of Waters & Waters in the Supreme Court of Kansas is not sustained by any evidence, and is contrary to the undisputed evidence in the case, which has been wholly disregarded by the Commissioner and the Court.

It is stated in the opinion of Mr. Justice Porter—referring to this claim—after stating the services performed by Waters & Waters, that: "It is sufficient to say that we approve the finding, and the allowance of the claim."

It must not be forgotten that the original controversy grew out of the refusal of the Mill Company to pay a demurrage charge of about ninety dollars. The Railway Company refused to perform further switching service for the Mill Company unless the demurrage charge was paid. A mandamus proceeding was instituted in this Court, and the defense interposed, among others, that the switching service desired was the handling of interstate commerce, and therefore the Court was without jurisdiction. That question and contention was summarily disposed of by this Court, and the peremptory writ of mandamus awarded solely upon the theory that the Railway Company, in refusing to handle the cars for the Mill Company, was guilty of discrimination against the Mill Company, which it could not do lawfully. The testimony of all the experts on the subject of reasonable attorneys' fees was excluded by the Commissioner, and his action in that regard approved. In fact, everything the Commissioner did seems to have been approved by

569 the Court. J. G. Waters testified (Brief, p. 37) that if he got \$50 or \$100 for his services in this Court, he would be making a fair charge. (Vol. 2, Rec., p. 670.) The Commissioner, however, allows him, or the firm of Waters & Waters, the sum of \$2,500, after having excluded all the testimony of the experts on the subject of attorneys' fees, and this Court approves the allowance, with the simple statement by the learned justice who wrote the opinion of the Court that: "It is sufficient to say that we approve the finding, and the allowance of the claim."

The Court, therefore, has approved a claim for \$2,500, more than

ten times the amount which the claimant himself says would be fair. We cannot understand why there should be such a disregard of the evidence in this case. Aside, however, from the testimony of Mr. Waters himself as to what he would consider a fair fee, we call the Court's attention to the services which he performed in this Court. Those services, all combined, could not possibly have exceeded five days, including the taking of testimony, preparation of brief, and argument of the case in this Court. The amount really involved was \$90, and yet this Honorable Court, sitting here as an impartial judicial tribunal, has placed its seal of approval upon the allowance of a claim of \$2,500, or at the rate of \$500 per day, for the services thus performed. The Court, in giving this allowance, calls attention to the case of *Noftzger v. Moffett*, 63 Kas. 354-359, in which it was said that the character and importance of the litigation, the labor and time necessarily involved therein, and the results of the same, should be taken into consideration in determining the amount of attorneys' fees. By the allowance of this extravagant and unreasonable item of \$2,500, this Court has absolutely repudiated the principle which it announced in that case. Mr. Waters himself testifies that his whole time and attention did not exceed five days, and the character and importance of the litigation in this Court, and the labor and time necessarily involved therein, in no manner justify any such allowance.

In this connection, we wish to call the attention of the Court to the opinion of Mr. Chief Justice White in the *Standard Oil Case*, in which he adopted a "rule of reason" in deciding that case. Evidently, the decision of the Chief Justice of the United States finds no lodgment in this Court, for if the "rule of reason" had been applied in the determination of this controversy no such ridiculous amount would have been allowed Waters, who never had the remotest idea he would be allowed \$2,500 for his services in this Court, until the Commissioner, without evidence, allowed it and this Court had said, "It is sufficient to say we approve the finding."

Ninth.

The allowance of \$11,400.00 for attorneys' fees and services in the United States Supreme Court, independent of the constitutional and statutory objection thereto, is extravagant, unreasonable and unjust.

This petition and application for a rehearing would not be presented except upon the theory that it would seem that the Court, in the multiplicity of matters which it has under consideration, has not given to this case, and the items of damage involved, that independent consideration which the defendant is entitled to have it give.

The Commissioner has incorporated in his report—improperly, as we think—a brief or argument in support of the theory or contention of plaintiff's attorneys as to the amount of attorneys' fees which they were entitled to recover. This case was referred to the Commissioner for the purpose of making findings of fact and conclusions of law, and not for the purpose of preparing an extensive brief and

argument in support of the theories or claims of either party. (See pp. 34-39, Commissioner's Printed Report.) The brief or argument presented by the Commissioner would tend, however, to show that the questions involved in the proceedings in the Supreme Court of the United States were not of that transcendent importance and far-reaching character as to justify the allowance of any such absurd amount for attorneys' fees, even though attorneys' fees were recoverable.

In view of the fact that the Commissioner has based his allowance of the amount of attorneys' fees upon his own experience and knowledge, we believe this Court should apply its own experience and knowledge in such matters, and not be bound absolutely by the conclusions reached by the Commissioner; and for that reason, among others, we ask that the Court reconsider this question of attorneys' fees, if it shall conclude, upon rehearing, that they are entitled to recover, and reduce the same to an amount within the bounds of reason.

572

Recapitulation.

This controversy has been pending since 1906. The principal and main question involved has been lost sight of in an unseemly scramble between the Larabees and their attorneys to outdo each other in an attempt to augment their respective demands. Special counsel was employed by the attorneys for the plaintiffs to appear before the Commissioner, temporarily, because of his supposed personal relations and influence with the Commissioner; and as soon as the Commissioner's report was prepared, the special counsel retired from the case. All elements of fairness were disregarded. There was no effort or apparent purpose to get at the facts, to the end that a just result might be reached. At the threshold of the investigation, parties were assured by the Commissioner that all evidence tendered would be heard, but that no incompetent evidence would be considered. Nevertheless, the transcript of the evidence and the abstract shows that this assurance was wholly disregarded. The record shows, incontestably, that Larabee was permitted to take a list prepared by his bookkeeper, and taken from his books, and testify as to facts about which he had, and could have had, no personal knowledge, with the books in the same building. And yet the Commissioner reports that, while the witness was using a list from which he testified, there was "nothing to warrant the conclusion that he was not testifying from his own knowledge as to the actual amount paid and as to service rendered."

573 In view of the undisputed facts, does this show that the defendant had that fair and impartial trial usually accorded to a party litigant? The Commissioner, in reaching this conclusion, was not fair enough to copy all of Larabee's testimony, but only that part of it which would seem to justify his conclusion that the evidence was not hearsay or secondary, and therefore, incompetent. (Brief, pp. 26, 27, 29, 30.) The Commissioner was not fair enough to incorporate in his report the sworn statement of Larabee (Vol. 2,

p. 521) that the list from which he testified was "honestly prepared by our bookkeeper, and I afterwards checked it with him. Now I don't remember what figures might have been submitted before that, but that statement that was finally filed in the court was a correct transcript of our expenses from the books."

Does such evidence show independent recollection on the part of Larabee? Does it not show that there was better evidence in his possession, which he was suppressing?

Again, referring to the last statement filed (Vol. 33, p. 1442), he says:

"I think it was taken the same as the first statement, from the books."

Again, Larabee says, referring to his statement and claim of damage (Vol. 2, Rec., p. 524), that:

"Q. Was it prepared by your bookkeeper?

A. It was.

Q. Under instructions to make it correct?

A. Yes, sir.

Q. And it was taken from your books?

A. Yes.

574 Q. And is your bookkeeper in your employ now?

A. Yes.

Q. He is a competent man?

A. I call him to be.

Q. How long has he been in your employ?

A. Five or six years.

Q. His instructions were to prepare a correct statement of the items from the books?

A. Yes, sir.

Q. And he prepared that, and gave it to you, and you to your attorney?

A. Yes."

Speaking of the men employed, referred to in the schedule, and the books showing the items, he testified (Vol. 2, Rec., p. 526):

"Q. Where would the bookkeeper get it?

A. He knew there were two men at the cars, and two at the warehouse.

Q. How did he know that?

A. Because he knew it. I knew it.

Q. Where did you get the information?

A. I got it from the pay rolls.

Q. Who prepared the pay roll?

A. Superintendent.

Q. Where would the superintendent get the exact hours of labor of these men?

A. He kept it himself.

Q. Have you the same superintendent in your employ now?

A. Yes, sir."

Again, he says (Vol. 2, p. 335 of Rec.):

"Q. You had been operating your mill with this team transfer?

A. Yes.

575 Q. And to its full capacity?

A. Yes.

Q. A half day in November—what date was that—1906?

A. I don't remember. It was given in the claim. I cannot remember.

Q. One-half day in November, 1906?

A. I may have to get the records to show you what day it was, if it does not state in the claim.

* * * * *

Q. Now, with reference to December 1st, 1906, have you any personal recollection of the shut-down on that day being on account of muddy roads?

A. All of these shutdowns were on account of muddy roads.

Q. What record have you to indicate that?

A. A long order kind of record.

Q. Does it show that the shutdown was for that purpose or another?

A. I think it does.

Q. Who kept that record?

A. Mr. McCord.

* * * * *

Q. How was your product registered?

A. By hourly records—count.

Q. This was done by records?

A. Yes, sir. (Vol. 2, p. 346.)

Q. Have you those records left?

A. Yes, sir, on the sheets.

Q. And then were transferred into your books?

A. Yes. (Vol. 2, Rec., p. 347.)

* * * * *

Q. What was your profit the preceding year?

A. As I told you, I would have to look at my records to tell you that." (Vol. 2, Rec., p. 350.)

576 Does all this indicate independent recollection of Larabee, and that better evidence was not in his possession? In his testimony, F. D. Larabee stated (Vol. 2, p. 425 of Rec.):

"Q. How many cars of grain, flour or millstuff did you load on the Santa Fe by teams?

A. I cannot tell you without referring to the books. I think I can get that."

Can any impartial tribunal read this record, and reach the conclusion that Larabee was testifying from his independent recollection, and not from what his bookkeeper told him he had taken from the books? Was the Commissioner fair in suppressing the foregoing from his report, in which he pretends to give all of Larabee's evidence upon the subject? This incompetent evidence was the sole basis for the findings of the Commissioner allowing the first, second, third and fourth claims, aggregating \$5,658.10.

The Commissioner finds that the defendant was entitled to a deduction of \$2 per car for each load transferred by team, and thereon concludes that:

"To determine justly the amount the mill company is entitled to recover on this claim, there should be deducted two dollars per car for each load transferred by teams. The evidence does not show the number of cars loaded from teams, nor is the data given in the evidence sufficient to enable me to form a just estimate of the number."

577 Ordinarily, with such a finding, one would expect that a Commissioner who desired or intended to be fair would not have allowed, even against a railway company, a claim or demand which could not be justly allowed. By the express finding of the Commissioner, the allowance of these claims was an injustice, and the most surprising thing is that this Honorable Court should, without observation or comment, approve this action of the Commissioner. Evidently, its approval was an oversight, especially in view of the fact that in his testimony Larabee stated (Rec., p. 425, Vol. 2):

"Q. How many cars of grain, flour, or millstuff did you load on the Santa Fe by teams?

A. I cannot tell you without referring to the books. I think I can get that."

By this it appears that Larabee had in his possession the books and evidence which would relieve the Commissioner from the embarrassment of allowing a claim which he could not justly allow without such evidence. Larabee alone had in his possession the books and evidence, but he did not produce them; and this Honorable Court is placed in the attitude of approving the allowance of a claim which the Commissioner himself says was an unjust claim.

Equally unjust is the allowance of the claim of \$1,890, for a "complete shutdown" of the mill. F. D. Larabee, on this item, testified:

"Q. You had been operating your mill with this team transfer?

A. Yes.

Q. And to its full capacity?

A. Yes.

Q. A half day in November—what date was that—1906?

A. I don't remember. It was given in the claim. I cannot remember.

578 Q. One-half day in November, 1906?

A. I may have to get the records to show you what day it was, if it does not state in the claim.

* * * * *

Q. Now, with reference to December 1, 1906—have you any personal recollection of the shutdown on that day being on account of muddy roads?

A. All of these shutdowns were on account of muddy roads.

Q. What record have you to indicate that?

A. A long order kind of record.

Q. Does it show that the shutdown was for that purpose or another?

A. I think it does.

Q. Who kept that record?

A. Mr. McCord." (Vol. 2, Rec., p. 335.)

This evidence is repeated here for the purpose of showing that Larabee had in his possession books which contained the record of the alleged shutdown, and was the best evidence of the fact. The books were not produced, and the claim allowed in the face of physical facts that the mill was not shut down as claimed.

Equally ridiculous is the item of \$186. The Mill Company was a partnership, composed of F. S. and F. D. Larabee. They each drew out of the firm \$200 per month. They gave certain attention to this litigation. They are allowed \$186 because the Mill Company lost that much of their time, and they are allowed the time because they were at work for themselves—the Mill Company. Can anything more absurd be conceived of?

Again, the amount of attorneys' fees allowed. A hypothetical question was prepared, stating facts which were so foreign to the facts in the case that the evidence based thereon was excluded, and the

Commissioner brought to bear his experience, and prepared
579 a brief on behalf of the plaintiffs' attorneys, and incorporated it in his report; and thereon found that the plaintiffs had been damaged \$6,034.10, and the attorneys had been damaged \$13,900. There is no finding of fact in the record, and no evidence that plaintiffs had been damaged in the sum of \$13,900, either by the payment of the same, or by reason of any liability therefor. (See Brief, pp. 57-58.) And the testimony of J. G. Waters and Charles Blood Smith shows conclusively that their purpose was one of graft and speculation, and not one of justice.

This Court apparently approves the allowance solely because the Commissioner allowed it, without giving the subject any independent investigation. Is not the defendant of right entitled to the independent consideration of this Court, especially since this Court, in the case of *State v. Ry. Co.*, 76 Kan. 501, adopted the rule that this Court is "not bound by the Referee's conclusion, either of fact or law, as would be the case were the facts found by another court or jury or referee of another court."

We do not think the personnel of the Commissioner in this case should have anything to do with the conclusions of the Court. In the case reported in 76 Kansas, supra, Judge Garver, of Topeka, was the Referee. He was a lawyer of unquestioned ability and integrity, and had had large experience on the bench, and there was nothing in the case, or in his report, to indicate that he had done otherwise than attempt to reach a fair and just conclusion, based upon the merits of the case, independent of who the parties litigant were. He was in no manner influenced by special counsel while the matter
was pending before him, but gave the same that careful and
580 intelligent thought which characterized his every judicial act.

In his findings he suppressed no evidence or fact which was for or against either party. His conclusions were in favor of the railway company. This Honorable Court, however, set aside his conclusions, and held that, "We are not bound by the Referee's conclusions, either of fact or law." And in an elaborate opinion by Justice Porter, reviewed the evidence, and made its own conclusions, and rendered judgment against the railway company. In this case, how-

ever, the findings of the Commissioner, while obviously not sustained by any competent evidence, and his conclusions of law are against the Railway Company, and the Court, through the same learned justice, writes an opinion, or, rather, adopts the report of the Commissioner as the opinion of the Court, and refuses, or at least neglects to give the evidence any independent consideration whatever.

Why the Court should adopt one rule in the case where the conclusions were in favor of the railway company, and just the reverse in this case, where the conclusions are against the company, we do not know, but certainly the defendant Company has the right to invoke the rules heretofore established by this Court in other cases for its protection, and we most respectfully ask this Honorable Court, as an impartial tribunal, to take the abstract of the evidence and determine the questions in controversy from such abstract, rather than from the findings of the Commissioner, to the end that a grave injustice shall not be done.

B. P. WAGGENER,
Attorney for Defendant.

581 Be it further remembered, that on the 11th. day of November, 1911, the same being one of the regular judicial days of the July 1911 Term of the Supreme Court of the state of Kansas, before said court in session at its court room in the city of Topeka, the following proceeding among others was had and remains of record in words and figures, as follows, to-wit:

582 In the Supreme Court of the State of Kansas.

No. 15167.

THE LARABEE FLOUR MILLS COMPANY, Plaintiff,

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Journal Entry of Judgment.

SATURDAY, November 11, 1911.

On this 11th day of November, 1911, comes on for hearing the motion filed by the Defendant, The Missouri Pacific Railway Company, for a new trial in this cause, as well as the petition for rehearing filed by the said Defendant, The Missouri Pacific Railway Company, which motion for a new trial and which petition for a rehearing, being duly considered by the Court, are both separately overruled and denied. Defendant excepting. It is therefore,

Ordered and Adjudged that the said plaintiff, The Larabee Flour Mills Company, do have and recover of and from the defendant, The Missouri Pacific Railway Company, for its damages awarded by this Court the sum of Twenty thousand & Fourteen & 10/100 dollars with interest thereon from the 8th day of July, 1911, at the rate of 6% per annum, together with the costs of this action herein taxed at Two thousand, eighty-three & 41/100 dollars, and hereof let execution issue.

583 In the Supreme Court of the State of Kansas.

No. 15167.

THE LARABEE FLOUR MILLS Co., Plaintiff,

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

I, D. A. Valentine, clerk of the supreme court of the state of Kansas, do hereby certify that the above and foregoing is a full, true and complete transcript of the record and proceedings on the amended motion for damages in the above entitled case, and also of the opinion of this court on the original proceeding and of the opinion of the Supreme Court of the United States in the appeal from the original proceeding, as the same now appear on file and of record in my office.

Witness my hand and the seal of the supreme court hereto affixed at my office in Topeka, Kansas, this 27th. day of November, A. D 1911.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,

Clerk Supreme Court of Kansas.

584 Here follows, the original petition for a writ of error, and assignments of error, the order allowing the writ of error, the writ of error, the citation and proof of service thereof, and a copy of the supersedeas bond.

585 In the Supreme Court of the State of Kansas.

F. D. and F. S. LARABEE, Partners under the Firm Name of The Larabee Flour Mills Company, Plaintiff,

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Petition for Writ of Error.

The Missouri Pacific Railway Company, the above named defendant, considering itself aggrieved by the final decision of the supreme court of the state of Kansas in rendering judgment against it in the above entitled case for \$20,014.10, and for costs, hereby prays a writ of error from the supreme court of the United States to the supreme court of the state of Kansas, to the end that said judgment and decision of the supreme court of the state of Kansas may be reviewed by the supreme court of the United States, and also an order fixing the amount of supercedeas bond.

And the said The Missouri Pacific Railway Company, defendant, as grounds for the issuance of said writ of error, assigns and alleges the following errors in the record and proceedings in said cause:

1st.

The supreme court of Kansas erred in holding and deciding, contrary to the contention of the defendant, and contrary to law, that the Judiciary Act of Congress, (Sections 999, 1000, 1003, and 1010, Compiled Statutes United States, 1901, Vol. 1) did not deprive the supreme court of Kansas of jurisdiction to assess damages against the defendant alleged to have accrued after the rendition of final judgment by it, and after such judgment had been superceded, as provided by said judiciary act, and was pending in the supreme court of the United States.

Second.

The said supreme court of Kansas erred in holding that the allowance of the writ of error heretofore allowed herein did not operate to remove the suit from the supreme court of the state to the supreme court of the United States, but merely operated to bring up the record for review.

Third.

The supreme court of Kansas erred in holding that the said 586 Larabee Flour Mills Company might recover in this proceeding damages and expenses, including attorneys' fees, which accrued after the giving of the supercedeas bond, and during the time said proceedings were pending in the supreme court of the United States.

Fourth.

The supreme court of Kansas erred in holding and deciding that it had jurisdiction to render judgment against the Missouri Pacific Railway Company for expenses incurred and attorneys' fees in defending the proceedings in error to the supreme court of the United States.

Fifth.

The supreme court of the state of Kansas erred in refusing to hold that, if attorneys' fees for services in defending the action in the supreme court of the United States, and expenses incident thereto, are recoverable at all, the same should be determined by that court, or in a proceeding on the supercedeas bond, and not by the supreme court of Kansas.

Sixth.

The supreme court of Kansas erred in refusing to hold that section 723, Chapter 182, Laws of Kansas, 1909, as construed by the supreme court of Kansas in McClure vs. Scates, 64 Kan. 284, deprived the defendant of its property without due process of law, and denied to it the equal protection of the law; and in refusing to hold and decide that said section 723, Chapter 182, Laws of 1909, was unconstitutional and void, and in conflict with 14th amendment, and that the allowance of attorneys' fees and expenses of litigation thereunder to the Larabee Flour Mills Company, against the defendant, denied to the defendant the equal protection of the law, and deprived it of its

property without due process of law,—in violation of the Constitution of the United States and the 14th amendment thereof and the laws enacted by Congress in pursuance thereof.

Seventh.

The supreme court of Kansas, by its decision and judgment herein, denied to the defendant the equal protection of the law, and refused to give due force and effect to the 14th amendment of the Constitution of the United States, and the laws of Congress passed in pursuance thereof.

Eighth.

The supreme court of Kansas erred in refusing to give full force and effect to the mandate of the supreme court of the United States, and has entered a different judgment against the defendant than it was authorized by said mandate to enter, and, in so doing, has disregarded the Constitution and laws of the United States.

Ninth.

The said supreme court of Kansas erred in holding and deciding that the Act of Congress entitled: "An Act to protect trade and commerce against unlawful restraint and monopolies" did not preclude the Larabee Flour Mills Company from recovering herein, although a member of such unlawful combination.

Tenth.

587 The said supreme court of Kansas was without jurisdiction to render judgment against this defendant for any amount, and, in assuming to render such judgment, deprived this defendant of its property without due process of law, and denied to it the equal protection of the law.

Eleventh.

The said supreme court of Kansas erred in rendering judgment against the defendant for any amount, and, in so doing, denied to the defendant the equal protection of the law as guaranteed by the 14th amendment to the constitution of the United States.

Twelfth.

The supreme court of Kansas erred in overruling and denying the motion, petition, and application of the said The Missouri Pacific Railway Company for a re-hearing, for reasons in said motion contained.

Thirteenth.

The supreme court erred in refusing to enter judgment in accordance with the mandate of the supreme court of the United States filed herein.

For which errors the said The Missouri Pacific Railway Company, defendant, prays that the said judgment of the supreme court of

Kansas announced, promulgated and filed herein, be reversed, and that it be restored to all things which it has lost by reason thereof.

B. P. WAGGENER,
*Attorney for the Defendant, The
Missouri Pacific Railway Company.*

STATE OF KANSAS,
Supreme Court:

Let the writ of error above prayed for issue upon the execution of a bond by the Missouri Pacific Railway Company, to the Larabee Flour Mills Company, in the sum of \$40,000.00; such bond, when approved, to operate as a supercedeas.

Dated this 13th day of November, 1911.

W. A. JOHNSTON,
Chief Justice of Supreme Court of Kansas.

588 [Endorsed:] 15167. Larabee Flour Mills Co. v. Mo. Pac.
Ry. Co. Petition for writ of error. Filed Nov. 13, 1911.
D. A. Valentine, Clerk Supreme Court.

589 In the Supreme Court of the State of Kansas.

F. D. and F. S. LARABEE, Partners under the Firm Name of The
Larabee Flour Mills Company, Plaintiff,

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Assignment of Errors.

Now comes the Missouri Pacific Railway Company, and files herewith its petition for a writ of error, and says that there are errors in the record and proceedings of the above entitled case, and, for the purpose of having the same reviewed in the supreme court of the United States, it makes the following statement and assignment of errors: viz—

First.

The supreme court of Kansas erred in holding and deciding, contrary to the contention and claim of the defendant and contrary to law, that the Judiciary Act of Congress, (Sections 999, 1000, 1003, 1010, Compiled Stat-es United States, 1901, Vol. 1) did not deprive the supreme court of Kansas of jurisdiction to assess damages against the defendant alleged to have accrued after the rendition of final judgment by it, and after such judgment had been superceded, as provided by said judiciary act, and was pending in the supreme court of the United States.

Second.

The said supreme court of Kansas erred in holding that the allowance of the writ of error heretofore allowed herein did not operate to remove the suit from the supreme court of the state to the supreme

court of the United States, but merely operated to bring up the record for review.

590

Third.

The supreme court of Kansas erred in holding that the said Larabee Flour Mills Company might recover in this proceeding, damages and expenses including attorneys' fees, which accrued after the giving of the supercedeas bond, and during the time said proceedings were pending in the supreme court of the United States.

Fourth.

The supreme court of Kansas erred in holding and deciding that it had jurisdiction to render judgment against the Missouri Pacific Railway Company for expenses incurred and attorneys' fees in defending the proceedings in error in the supreme court of the United States.

Fifth.

The supreme court of the state of Kansas erred in refusing to hold that, if attorneys' fees for services in defending the action in the supreme court of the United States, and expenses incident thereto, are recoverable at all, the same should be determined by that court, or in a proceeding on the supercedeas bond, and not by the supreme court of Kansas.

Sixth.

The supreme court of Kansas erred in refusing to hold that section 723, Chapter 182, Laws of Kansas, 1909, as construed by the supreme court of Kansas in *McClure vs. Scates*, 64 Kansas, 284, deprived the defendant of its property without due process of law, and denied to it the equal protection of the law; and, in refusing to hold and decide that said section 723, Chapter 182, Laws of 1909, was unconstitutional and void and in conflict with the 14th amendment, and that the allowance of attorneys' fees and expenses of litigation thereunder to the Larabee Flour Mills Company, against the defendant, denied to the defendant the equal protection of the law, and deprived it of its property without due process of law,—in violation of the Constitution of the United States and the 14th amendment thereto, and the laws enacted by Congress in pursuance thereof.

591

Seventh.

The Supreme court of Kansas, by its decision and judgment herein, denied to the defendant the equal protection of the law, and refused to give due force and effect to the 14th amendment of the Constitution of the United States, and the laws of Congress passed in pursuance thereof.

Eighth.

The supreme court of Kansas erred in refusing to give full force and effect to the mandate of the supreme court of the United States,

and has entered a different judgment against the defendant than it was authorized by said mandate to enter, and, in so doing, has disregarded the Constitution and laws of the United States.

Ninth.

The said supreme court of Kansas erred in holding and deciding that the Act of Congress entitled: "An Act to protect trade and commerce against unlawful restraint and monopolies," did not preclude the Larabee Flour Mills Company from recovering herein, although a member of such unlawful combination.

Tenth.

The said supreme court of Kansas was without any jurisdiction to render judgment against this defendant for any amount, and, in assuming to render such judgment, deprived this defendant of its property without due process of law, and denied to it the equal protection of the law.

Eleventh.

The said supreme court of Kansas erred in rendering judgment against the defendant for any amount, and, in so doing, denied to the defendant the equal protection of the law as guaranteed by the 14th amendment to the constitution of the United States.

592

Twelfth.

The Supreme court of Kansas erred in overruling and denying the motion, petition, and application of the said The Missouri Pacific Railway Company for a re-hearing, for reasons in said motion contained.

Thirteenth.

The supreme court erred in refusing to enter judgment in accordance with the mandate of the supreme court of the United States, filed herein.

For which above stated errors, and the many others appearing in the record, The Missouri Pacific Railway Company prays that the judgment of the supreme court of Kansas of date November 11th, 1911, be reversed, and that it be restored to all things which it has lost thereby.

B. P. WAGGENER,

Attorney for Defendant,

The Missouri Pacific Railway Company.

593

[Endorsed:] 15167. Larabee Flour Mills Co. v. Mo. Pac. Ry. Co. Assignment of Errors. Filed Nov. 13, 1911. D. A. Valentine, clerk supreme court.

594

In the Supreme Court of the State of Kansas.

F. D. and F. S. LARABEE, Partners under the Firm Name of The
Larabee Flour Mills Company, Plaintiff,

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

*Journal Entry of Allowance of Writ of Error and Superceding
Judgment.*

The defendant, The Missouri Pacific Railway Company, having presented its application for a writ of error to the supreme court of the state of Kansas to correct the judgment rendered by the said court against it on the 11th day of November, 1911, in the suit wherein said Larabee Flour Mills Company was plaintiff and the Missouri Pacific Railway Company was defendant; and having presented with its application its due assignment of errors in that regard, presents now a citation to be signed.

Accordingly it is ordered that said writ of error be allowed, and that said citation be signed upon the said defendant giving to the said plaintiff a good and sufficient bond, in the sum of \$40,000.00, conditioned that said defendant shall prosecute its writ of error to effect, and, if it fail to make good its plea, shall answer all damages and costs; said security and bond to be approved by this Court, or one of the Justices thereof, and the writ thereunder to be a superseas.

And thereupon said defendant now presents a bond, with a good and sufficient surety, in the sum of \$40,000.00, as aforesaid,—which is approved by the Chief Justice, and ordered filed with the clerk of the supreme court of the state of Kansas.

Approved this 13th day of November, 1911.

W. A. JOHNSTON,
Chief Justice of Supreme Court of Kansas.

595 [Endorsed:] 15167. Larabee Flour Mills Co. v. Mo. Pac.
Ry. Co. Journal Entry. J. E. Allowing Writ of Error.
Filed Nov. 13, 1911. D. A. Valentine, clerk Supreme Court.

596

In the Supreme Court of the United States.

THE MISSOURI PACIFIC RAILWAY COMPANY, Plaintiff in Error,

vs.

F. D. LARABEE and F. S. LARABEE, Partners under the Firm Name
of The Larabee Flour Mills Company, Defendants in Error.*Writ of Error.*

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the
Judges of the Supreme Court of the State of Kansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court before you, or some of you,—being the highest court of law or equity of the said state in which a decision could be had, in the certain suit between F. D. Larabee and F. S. Larabee, partners in business under the style and firm name of the Larabee Flour Mills Company, plaintiff, and the Missouri Pacific Railway Company, defendant, wherein was drawn in question the construction of a clause of the Constitution of the United States, and likewise the construction of the Acts of Congress of the United States enacted in pursuance of such Constitution, and wherein was also drawn in question the validity of a statute of the state of Kansas, and of an authority exercised under said statute, on the ground of their being repugnant to the Constitution and laws of the United States, and the decision was against the title, right, privilege or exemption specifically set up and claimed under the Constitution and under said Acts of Congress; and said decision was likewise in favor of the validity of the statute of said state, and the authority exercised under it, a manifest error hath happened, to the great damage of the Missouri Pacific Railway Company, as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within thirty days from the date hereof, that the record and proceedings being inspected, the Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward Douglass White, Chief Justice of

the Supreme Court of the United States, this 13 day of November, 1911.

United States Circuit Court, District of Kansas, First Division.

[The Seal of the Circuit Court of the United States, District of Kansas, 1862.]

GEO. F. SHARITT, *Clerk.*

Allowed:

W. A. JOHNSTON,

Chief Justice Supreme Court of Kansas.

598 [Endorsed:] 15167. Writ of error. 15167. *Writ of Error.* Filed Nov. 13, 1911. D. A. Valentine, clerk Supreme Court.

599 *Citation.*

THE UNITED STATES OF AMERICA:

The President of the United States to F. S. Larabee and F. D. Larabee, partners as the Larabee Flour Mills Company, Greeting:

You are hereby cited and admonished to be and appear at and before the supreme court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the supreme court of the state of Kansas, wherein the Missouri Pacific Railway Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Chief Justice of the Supreme Court of the State of Kansas, this 13th day of November, 1911.

W. A. JOHNSTON,

Chief Justice Supreme Court of Kansas.

Attest:

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,

Clerk Supreme Court of Kansas.

TOPEKA, KANSAS, Nov. 13th, 1911.

The undersigned, attorneys of record for the defendant in error, the Larabee Flour Mills Company, hereby acknowledge due service of the above citation, and enter an appearance in the Supreme Court of the United States.

WATERS & WATERS,

C. B. SMITH &

J. F. SWITZER,

Attorneys for Larabee Flour Mills Company,

Defendant in Error.

600 [Endorsed:] 15167. Larrabee Flour Mills Co., Pl'ff, v. Mo. Pac. R'l'y Co., Def't. Citation. Issued Nov. 13th, 1911. Returned and filed Nov. 13, 1911. D. A. Valentine, clerk Supreme Court.

601 In the Supreme Court of the State of Kansas.

F. D. and F. S. LARABEE, Partners under the Firm Name of The Larabee Flour Mills Company, Plaintiff,

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Bond.

Know all men by these presents that we, the Missouri Pacific Railway Company, as principal, and B. P. Waggener and W. J. Bailey, as sureties, are held and firmly bound unto the plaintiff herein, the Larabee Flour Mills Company in the sum of \$40,000.00, to be paid to it, the said Larabee Flour Mills Company—to which payment, well and truly to be made, we bind ourselves, jointly and severally, by these presents.

Sealed with our seals and dated this 13th day of November, 1911.

Whereas the above named defendant, The Missouri Pacific Railway Company, seeks to prosecute its writ of error to the supreme court of the United States, to reverse the judgment rendered in the above entitled action by the supreme court of the state of Kansas in favor of the said plaintiff, the Larabee Flour Mills Company, and against the said Missouri Pacific Railway Company, and to supersede the said judgment rendered therein on the 11 day of November, 1911.

Now therefore, the condition of this obligation is such that if the above named defendant shall prosecute its said writ of error to effect, and answer all costs and damages that may be adjudged against it, if it shall fail to make good its plea, then this obligation to be void; otherwise to remain in full force and effect.

THE MISSOURI PACIFIC RAILWAY
COMPANY,

By B. P. WAGGENER,

Its General Solicitor.

B. P. WAGGENER.

W. J. BAILEY.

Bond approved, and to operate as a supersedeas.

W. A. JOHNSTON,

Chief Justice, State of Kansas.

(Endorsed:) 15,167. Larabee Flour Mills Co. v. Mo. Pac. Ry. Co. Bond. Filed Nov. 13, 1911. D. A. Valentine, Clerk Supreme Court.

602 SUPREME COURT,
State of Kansas, ss:

I, D. A. Valentine, clerk of the supreme court of the state of Kansas, do hereby certify that there was lodged with me as such clerk on November 13th, 1911, in the matter of the Larabee Flour Mills Co. v. The Mo. Pac. R'y Co. (Motion for damages.)

1. The original bond of which a copy is herein set forth.

2. Two copies of the writ of error, as herein set forth, one for the plaintiff and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in Topeka, Kansas, this 27th day of November, A. D. 1911.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk Supreme Court of Kansas.

603 UNITED STATES OF AMERICA,
Supreme Court of Kansas, ss:

In obedience to the commands of the within writ, I herewith transmit to the supreme court of the United States, a duly certified transcript of the complete record and proceedings relating to the motion for damages in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Kansas, in the city of Topeka, this 27th day of November A. D. 1911.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk Supreme Court of Kansas.

Endorsed on cover: File No. 22,954. Kansas supreme court. Term No. 878. Missouri Pacific Railway Company, plaintiff in error, vs. F. D. Larabee and F. S. Larabee, partners in business under the style and firm name of the Larabee Flour Mills Company. Filed December 6th, 1911. File No. 22,954.

1870

1871

1872

1873

1874

14
U.S. SUPREME COURT, D. C.
FILED.

DEC 26 1912

JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

October Term, 1912.

MISSOURI PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

VS.

F. D. LARABEE AND F. S. LARABEE, DOING
BUSINESS UNDER THE FIRM-NAME OF THE LAR-
ABEE FLOUR MILLS COMPANY,
Defendant in Error.

No. 42. 135

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR,
ON MOTION TO DISMISS WRIT OF ERROR,
OR TO AFFIRM.

JOSEPH G. WATERS,

CHARLES BLOOD SMITH,

JOHN C. WATERS,

JOHN F. SWITZER,

Attorneys for Defendant in Error.

SUBJECT INDEX.

The record in this case shows that no Federal question is involved. (Pp. 11-13.)

Unless a Federal question is presented, the motion to dismiss or affirm lies. (Pp. 13-15.)

The construction of the Kansas statute permitting the recovery of attorneys' fees as part of the damages is clearly not a violation of the Fourteenth Amendment, but is an exercise within the police power of the State. (Pp. 16-42.)

The failure of the Railway Company to raise the defense of an alleged violation of the anti-trust laws until after a final judgment had been rendered and affirmed by this court prevented such defense from now being considered here. (Pp. 15, 42.)

The controversy in this cause not being bottomed upon the alleged trust agreement, the defense of violation of anti-trust laws is not available to plaintiff in error. (Pp. 42, 44, 45.)

The State court found that the defendant in error was not a member of an illegal trust, and this court is concluded in this proceeding by such finding. (Pp. 43, 46, 47.)

CASE INDEX.

	<i>Page</i>
Bacon vs. Ins. Co., 131 U. S. 258.....	40
Bank vs. Rly. Co., 163 U. S. 325.....	21
Barbier vs. Connolly, 113 U. S. 27.....	30, 34, 37
Barton vs. Mulvane, 59 Kans. 313.....	45
Booth vs. Illinois, 200 U. S. 561.....	37
 Carney vs. Neeley, 60 Kans. 672.....	6
Chadwick vs. Riley, 187 U. S. 543.....	16
Claffin vs. Houseman, 93 U. S. 130.....	24
Connolly vs. Pipe Co., 184 U. S. 540.....	44
Cory vs. Campbell, 154 U. S. 629.....	29
 Davidson vs. N. O., 96 U. S. 97.....	29
De Saussure vs. Gaillard, 127 U. S. 216.....	14
Dower vs. Richards, 151 U. S. 658.....	43
 Egan vs. Hart, 165 U. S. 188.....	46
Eustis vs. Bolles, 150 U. S. 361.....	14
 Forsyth vs. Hammond, 166 U. S. 506.....	37
 Gibson vs. Chouteau, 8 Wall. 314.....	15
Giles vs. Little, 134 U. S. 645.....	33
Giles vs. Teasley, 193 U. S. 16.....	14
 Hale vs. Akers, 132 U. S. 554.....	15
Hale vs. Lewis, 181 U. S. 473.....	15
Hayes vs. Mo., 120 U. S. 68.....	30
Head vs. Mfg. Co., 113 U. S. 9.....	29
Hopkins vs. McClure, 133 U. S. 380.....	15
Hunter vs. Pittsburgh, 207 U. S. 161.....	37, 33
 Ins. Co. vs. Warren, 181 U. S. 73.....	31
 Johnson vs. Rick, 137 U. S. 300.....	15
 King vs. W. Va., 216 U. S. 92.....	46
Kingsbury vs. R. R. Co., 156 Mo. 379.....	19
 Land Co. vs. Laidley, 159 U. S. 103.....	29
Larabee vs. Mo. Pac., 74 Kans. 808.....	7

	<i>Page</i>
Larabee vs. Mo. Pac., 85 Kans. 214.....	20
Life Assn. vs. Mettler, 185 U. S. 68.....	31
Life Assn. vs. Yoakum, 98 Fed. 257.....	18
Manley vs. Park, 187 U. S. 547.....	15
Maryland vs. Hyman, 98 Md. 597.....	16
McClure vs. Scales, 64 Kans. 284.....	6
Mining Co. vs. Pa., 125 U. S. 185.....	35
Missouri vs. Lewis, 101 U. S. 22.....	21
Missouri Pac. vs. L. M. Co., 211 U. S. 612.....	5
Moore vs. Mo., 159 U. S. 673.....	21
Mugler vs. Kansas, 123 U. S. 623.....	33
Munn vs. Illinois, 94 U. S. 113.....	17
Murray vs. R. R. Co., 62 Fed. 24.....	25
New Orleans vs. Waterworks Co., 142 U. S. 79.....	14
Olcott vs. Supervisors, 16 Wall. 689.....	19
Oregon vs. Hitchcock, 202 U. S. 60.....	33
Plague Mines v. Henderson, 170 U. S. 511.....	24
Powell vs. Penn., 127 U. S. 678.....	37
R. R. Co. vs. Coachman, 59 Fla. 130.....	16
R. R. Co. vs. Ellis, 165 U. S. 150.....	18
R. R. Co. vs. Humes, 115 U. S. 512.....	17
R. R. Co. vs. Illinois, 200 U. S. 561.....	16
R. R. Co. vs. Iowa, 160 U. S. 389.....	29
R. R. Co. vs. Kentucky, 183 U. S. 503.....	16
R. R. Co. vs. Kentucky, 161 U. S. 601.....	16
R. R. Co. vs. Matthews, 165 U. S. 1.....	19
R. R. Co. vs. Matthews, 174 U. S. 96.....	17
R. R. Co. vs. Ohio, 173 U. S. 285.....	16
R. R. Co. vs. Paul, 173 U. S. 404.....	18
R. R. Co. vs. R. R. Co., 14 Wall. 23.....	14
R. R. Co. vs. Seegers, 207 U. S. 73.....	19
Sharpless vs. Buckles, 65 Kans. 838.....	21
Shelby vs. Guy, 11 Wheat. 361.....	40
Smalley vs. Yates, 56 Kans. 519.....	20
Soon Hing vs. Crowley, 113 U. S. 709.....	30
Stryker vs. Goodnow, 123 U. S. 527.....	33
Wade vs. Lawder, 165 U. S. 624.....	14
Walker vs. Sanvinet, 92 U. S. 90.....	29
Walston vs. Nevada, 128 U. S. 578.....	30
Waters-Pierce Co. vs. Texas, 177 U. S. 28.....	31, 46
Welch vs. Swasey, 214 U. S. 91.....	37



In the Supreme Court of the United States.

October Term, 1912.

MISSOURI PACIFIC RAILWAY COMPANY, <i>Plaintiff in Error,</i>	}	No. 479.
vs.		
F. D. LARABEE AND F. S. LARABEE, DOING BUSINESS UNDER THE FIRM-NAME OF THE LAR- ABEE FLOUR MILLS COMPANY, <i>Defendant in Error.</i>		

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR, ON MOTION TO DISMISS WRIT OF ERROR, OR TO AFFIRM.

STATEMENT.

THIS case was originally brought by the Larabee Mills Company against the Missouri Pacific Railway Company, to compel it to perform the duty of opening to the Mills Company, for its traffic over it, of a switch connecting the Missouri Pacific with the tracks of the Santa Fe.

The suit was brought in the Supreme Court of Kansas. An alternative writ of mandamus was issued;

the Missouri Pacific refused to obey it, and the case was tried in that court. The Missouri Pacific set up several defenses, among which, were the Federal questions that to require the service was taking the property of that railway without compensation or due process of law; that it was a violation of the 14th Amendment, and that the Missouri Pacific being engaged somewhat in inter-state traffic, that the State thereby lost all jurisdiction over every railway thus engaged, and that the jurisdiction was wholly in the courts of the United States.

The Supreme Court of Kansas decided against the legality of all these defenses, and rendered judgment against the Missouri Pacific that a peremptory writ issue compelling the performance of the duty demanded, and rendered judgment for costs and damages. Upon the rendition of this judgment the case was taken on writ of error to this court, and this court affirmed the judgment of the Supreme Court of Kansas. (211 U. S., p. 612.) Upon its return to the Supreme Court of Kansas the Mills Company applied for a commissioner to ascertain the damages sustained by the failure of the Missouri Pacific to perform such duty; the commissioner was appointed and took testimony, reporting damages for the non-operation of the

mill, the extra cost of teaming over to the Santa Fe tracks, the mill being situated a mile away on the track of the Missouri Pacific, allowed various items of expense, and among which were the amounts paid out by the Mills Company for attorneys' fees in the Supreme Court of Kansas and in this court, and the Supreme Court of Kansas awarded the peremptory writ and execution for the amount of such expenses and damages. When the commissioner made his report, the Missouri Pacific again presented the very same objections and defenses it had made in the main case to the allowance of these damages, with the additional defenses to their allowance, that the expenses of attorneys in defending this suit in this court, and the expenses of attorneys in coming to Washington to argue the same, and the additional expenses of printing briefs in this court, could not be recovered; and the still further defense that the Mills Company was a member of a trust denounced by the trust laws of the United States and Kansas as well, and could not in consequence have any standing in either jurisdiction because of such illegal connection with such a trust: and it is on these questions the Missouri Pacific again comes to this court on its present appeal. This is a simple statement of the entire controversy. The

record in this case of over 300 pages contains all that ever occurred in the case from its inception, and a large portion of which confuses the search in finding the actual controversy and much of which has nothing to do with the controversy.

BRIEF AND ARGUMENT.

In determining what damages were recoverable, there was and is the following statute of Kansas:

SEC. 6310. "The writ of mandamus may be issued by the Supreme Court . . . to any corporation, board or person to compel the performance of any act which the law specially enjoins as a duty resulting from an office, trust or station;" (Gen. Stat. 1909, p. 1375.)

SEC. 6319. "If judgment be given for the plaintiff, he shall recover the damages which he shall have sustained to be ascertained by the court or jury or by referees as in a civil action, and costs and a peremptory mandamus shall also be granted to him without delay." Gen. Stat. 1909, p. 1377.

SEC. 6320. "A recovery of damages by virtue of this article against a party who shall have made a return to a writ of mandamus, is a bar to any other action against the same party for the making of such return." (Gen. Stat. 1909, p. 1377.)

This court in settling the questions raised by the plaintiff in error upon a former writ of error (*Ry. Co. v. Larabee Mills*, 211 U. S. 612), has already held that the defendant in error was entitled in this case to the writ prayed for. In the opinion at page 620, it is said:

"Indeed, all these questions are disposed of by one

well-established proposition, and that is, that a party engaging in the business of a common carrier is bound to treat all shippers alike, and can be compelled to do so by mandamus or proper writ."

Long before this case was brought, the Supreme Court of Kansas in the case of *McClure v. Scales*, 64 Kan. 284, in a mandamus case, in speaking of the foregoing sections decided:

"Instead of resorting to a separate action for damages, the successful plaintiff may secure them as a part of his remedy in mandamus; and the code further provides that a recovery of damages by virtue of this article against a party who shall have made a return to a writ of mandamus is a bar to any other action against the same party for the making of such return.

"Through dereliction of duty on the part of the contest court, the plaintiff incurred loss and expenses for which the recalcitrant judges are liable. The plaintiff was entitled to recover as damages the necessary outlay for attorneys, as well as for other loss and expenses resulting from the wrong of defendants. Such expenses were allowed in a mandamus proceeding in this court, where judgment was rendered in favor of the plaintiff. (*Carney v. Neeley*, 60 Kan. 672; 57 Pac. 527.) No mention is made of damages in the written opinion, but in a supplementary proceeding damages were claimed and allowed over the objection of the defendant. We find sufficient evidence to sustain the award of damages."

In the original judgment rendered in this case (*Larabee v. Railway Co.*, 74 Kan. p. 822), the court decided:

"The peremptory writ of mandamus may issue, with costs to the plaintiff. The court has authority to render judgment in favor of the plaintiff for any damages it has sustained. The plaintiff is given ten days in which to file a claim for damages stating separately the character and amount of each item. The defendant is given ten days after notice of the filing of the claim in which to except to any items which it may deem not recoverable. The court will then pass upon the exceptions, if any be taken, and make orders respecting a hearing."

Thereafter the commissioner heard evidence, and allowed the Mills Company the amount paid and for which it was responsible to its attorneys, and on November 11th, 1911, the Supreme Court rendered judgment for such damages.

The amount of such damages, if they were allowable, is wholly within the exclusive jurisdiction of the Supreme Court of Kansas. This was an extraordinary proceeding; the railway company shut off the use of a transfer track to another railway, and necessarily causing injury to the business operations of the mill. It required an expense and cost for the Mills Company to compel the railway to perform its duty to the Mills Company. It disregarded its duty and

trust; it would not obey the law, nor the mandate of the Supreme Court of Kansas. If the Supreme Court of Kansas had no power to reimburse the Mills Company, to maintain its rights and protect it in this court, the wrong could not be redressed, and its right was without remedy. We claim under the law and as interpreted by the Supreme Court of Kansas that where the cost, the expense or the damages were incurred necessarily in protecting that right and enforcing it against the tort-feasing railway, it was just and proper damages to be allowed, regardless of how it occurred or what it might be called. Every item of these damages pertains to a suit in the exclusive jurisdiction of the Supreme Court of Kansas, based only on the laws of Kansas and the decisions of its highest court; and in which case, at the time of the award of these damages, there was no Federal question, and no jurisdiction of the Supreme Court of the United States. Regardless of whether the amounts allowed are designated as attorneys' fees in a case pending in the Supreme Court of the United States, they are expenses necessarily laid out and expended to obtain a right under the laws of Kansas, of which the Mills Company was deprived, and which right would have been wholly ineffectual, were not the Mills Company at last to be made whole.

We claim that in this controversy there is no Federal question involved, there is no jurisdiction of the Supreme Court of the United States, and that the power resides in the State *as part of the remedy*, and which was so expressly decided, where a corporation or person is disobedient to the mandates of the State law, to give damages comprehensive enough to equal the entire expenses, and then the right to double them or amerce the offender with a fine if this were the requirement of the statute; and the remedy is wholly with the State court. The decisions of this court justify this contention.

This court has had a multitude of cases where it has been sought to stay the power of a State in the execution of its own laws, in its own courts, upon matters only concerning itself and its internal affairs and the decisions have been to the end that the authority of the States in such cases is upheld, except where in clear cases they impinge on a jurisdiction that is not their own or plainly and palpably infringe some provision of the National Constitution.

The propositions advanced by the railway company are variously stated in its assignment of errors, to be the allowance of these damages after the giving of a supersedeas bond, that they were allowed with-

out due process of law, that they were in conflict with the 14th Amendment, that the railway company was denied the equal protection of the law, and that the Supreme Court of Kansas was without jurisdiction.

Hon. HENRY C. SLUSS, of Wichita, Kansas, late Judge of the United States Court of Spanish Claims, at the very head of the bar in his State, was appointed commissioner to take testimony and make findings of fact and law. In his report he made findings as to the allowance of these damages as follows:

"1. That the jurisdiction of this court in mandamus is the creation of the constitution and the statutes of the State of Kansas.

"2. That this court is the sole judge of what that constitution and those statutes provide.

"3. That the jurisdiction of this court in mandamus over persons within its jurisdiction cannot be affected by an Act of Congress.

"4. That the Judiciary Act does not and was not intended to affect the jurisdiction of this court.

"5. That the jurisdiction of this court in mandamus attaches upon the issuance of the alternative writ, and the subject-matter of the proceeding being the awarding a peremptory mandamus, that jurisdiction continues unabated, not only until the writ is awarded, but also until the writ is issued and obedience to it enforced.

"6. That the alternative writ is a command of the performance of specified and prescribed duties; and

return to the writ is a refusal to perform the duties prescribed; the judgment awarding a peremptory mandamus is a conclusive adjudication that such refusal was wrongful and the act of the court compelling compliance with the command of the alternative writ.

"7. That the damages comprehended by the Kansas statute are the injuries sustained as the natural and probable consequences of the wrongful refusal to comply and the expenses reasonably and necessarily incurred in compelling compliance with the command of the alternative writ.

"8. That the allowance of the writ of error did not operate to remove the suit from the Supreme Court of the State into the Supreme Court of the United States; its only effect was to bring up the record for the purpose of review.

"9. The allowance of the writ of error did not operate as a supersedeas; the taking the supersedeas bond brought about the supersedeas. The taking the bond, and the supersedeas itself in so far as it can be conceived of as a substantial act, was the action of the Supreme Court of Kansas." (Record, pp. 273, 274.)

The Supreme Court of Kansas in deciding on the report of the commissioner, said:

"Again the conclusions of the learned commissioner are so clearly and forcibly stated that we adopt them as part of our opinion." (Record, p. 273.)

Coming now to the question of damages allowed, we believe our contention is the law, that if there is no Federal question involved, it is a matter of absolute

unconcern what the courts of a State may decide; and further, it has to be a matter of substance; for this court, as its decisions abundantly attest, has no bent to increase its jurisdiction and take to itself all the multitudinous and petty matters where relief is sought in this court, when hope has deserted the litigants in the State courts.

This case was the command of the State to the railway to obey the law and perform its duty. It did not do so. It was a duty the railway company infringed, and this is higher in the scale of punishment or damage than a controversy based on some contractual right. The Legislature of the State had the right to declare all damages that resulted from the failure to perform the duty, and a disobedience of its writ would be saddled on the one who disobeyed; that then he should pay double or treble such damages or that the offender could be mulct with a fine; and it would depend on the particular litigant whether or not this court would not have before it each case, to determine the policy of a State about its own concerns and with which the courts of the United States have nothing to do. What basis of calculating the expense might be adopted by the State court would be immaterial to this court. In the enforcement of the laws,

in the issuance of writs of mandamus, it is an exercise of the police power of the State; a power elastic enough to compel justice and punish wrong; a power that is the very chief of all powers, in a time of peace possessed by a sovereign. It was invoked in this case, and the other side would like to pull its claws and extract its teeth, if they could do so under some pretended infraction of the National Constitution.

On the trial of this case and from which a writ of error was taken to this court, there was no question made by the pleadings, offered in argument, or decided in either court, concerning the allowance of attorneys' fees, or that the Mills Company was a member of an illegal trust and had no standing in court to protect its business. It was after this case had been determined in this court that these questions were presented for the first time before the commissioner. The judgment rendered originally had nothing of this controversy. Where there is a judgment which of itself is unassailable, like the judgment in this case, we respectfully suggest that no Federal question inures in the taxing of costs or proof of damages, under such judgment afterwards taken.

"And it has been repeatedly decided, under section 709 of the Revised Statutes, that to give this court ju-

jurisdiction of a writ of error to a State court, it must appear affirmatively, not only that a Federal question was presented for decision to the highest court of the State having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it."

De Saussure v. Gaillard, 127 U. S. 216, at page 234.

"Where the record discloses that, if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question, not Federal, has been also raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the Federal question, to sustain the judgment, this court will not review the judgment."

Eustis v. Bolles, 150 U. S. 361, 366.

Justice DAY, in speaking for the court in *Giles v. Teasley*, 193 U. S., at page 160, said:

"It is equally well settled that if the decision of a State court rests on an independent ground—one which does not necessarily include a determination of the Federal right claimed—or upon a ground broad enough to sustain it without deciding the Federal question raised, this court has no jurisdiction to review the judgment of the State court. *New Orleans v. New Orleans Waterworks Co.*, 142 U. S. 79; *Eustis v. Bolles*, 150 U. S. 361; *Dower v. Richards*, 151 U. S. 658, 666; *Wade v. Lawder*, 165 U. S. 624, 628."

Hale v. Lewis, 181 U. S. 473.

- Hale v. Akers*, 132 U. S. 554.
Hopkins v. McClure, 133 U. S. 380.
Johnson v. Rick, 137 U. S. 300.
Gibson v. Chouteau, 8 Wall. 314.
Rd. Co. v. Rd. Co., 14 Wall. 23.

"As the authority conferred by Kansas upon her courts was to set aside void judgments, provisions of the Constitution of the United States which would have been available if pleaded or otherwise presented in the State courts as a defense in the proceedings in the original action to defeat the recovery of a valid judgment, cannot, when the opportunity has not been availed of and the judgment has become a finality, be resorted to, as establishing that in fact the judgment possessed no binding force or efficacy whatever."

Manly v. Park, 187 U. S. 547, 551.

The foregoing decision should of itself eliminate what the railway company now offers as to the Mills Company being a member of an illegal trust with no standing in court to enforce a right, for the reason the railway always had and could have made this defense, such as it is, but left it out, and now, after the final judgment was taken, the railway company desired to use it to destroy the entire validity of the final judgment.

"Such contention might seem reasonable to have been urged in the state courts, but as they have seen fit to disregard it, and to put a different construction upon the language employed, this court must accept

the meaning of the state enactment to be that found in them by the state courts."

Rd. Co. v. Kentucky, 183 U. S. 503, 508.

"The interference with the commercial power of the general government, to be unlawful, must be direct and not the merely incidental effect of enforcing the police power of a state."

Rd. Co. v. Kentucky, 183 U. S. 503, 519.

Rd. Co. v. Kentucky, 161 U. S. 701.

"This construction of the State statutes by the Supreme Court of the State, must, of course, in a case like the present, be accepted by us."

Chadwick v. Kelly, 187 U. S. 543.

"Compelling obedience to the laws of the State is as much the exercise of police power, in the maintenance of order, peace and quiet, as that which pertains to the promotion of health and safety."

Maryland v. Hyman, 98 Md. 597.

"The police power of a State embraces regulations designed to promote the public convenience or the general prosperity or the public welfare."

Rd. Co. v. Coachman, 59 Fla. 130.

The statute will *not be said to offend* against the equal protection clause of the State Constitution or the inhibition of Article XIV of the Federal Constitution merely because it permits a recovery of interest and attorneys' fees by the shipper if he succeeds, and secures no such right to the carrier in the event it prevails in the suit. The shipper and the carrier are not

similarly situated. The shipper assumes the discharge of no duty to the public. He injures no one.

Rd. Co. v. Coachman, 59 Fla. 137.

Munn v. Illinois, 94 U. S. 113.

"The police power of a State embraces regulations designed to promote the public convenience or the general prosperity or the public welfare as well as those designed to promote the public safety or the public health."

Rd. Co. v. Illinois, 200 U. S. 561.

Rd. Co. v. Ohio, 173 U. S. 285.

A Kansas statute providing for the allowance of an attorney's fee to be made a part of the judgment in case of a recovery against the railroad company for damages from fire was held by this court to be a police regulation, and not in violation of the Fourteenth Amendment. (*R. R. Co. v. Matthews*, 174 U. S. 96.) In the conclusion of the opinion with reference to the statute in question, it was said (p. 106) :

"Giving full force to its purpose as declared by the Supreme Court of Kansas, to the presumption which attaches to the action of a legislature that it has full knowledge of the conditions within the State, and intends no arbitrary selection or punishment, but simply seeks to subserve the general interest of the public, it must be sustained."

Rd. Co. v. Humes, 115 U. S. 512.

Barbier v. Connolly, 113 U. S. 27.

Interest at fifty per cent a year and attorney's fees sustained.

Life Assn. v. Yoakum, 98 Fed. 257.

Rd. Co. v. Paul, 173 U. S. 404.

The disobedience of the law by the Missouri Pacific, refusing to do its duty in transferring from one track to another, is of all grave things imperiling the public peace, safety, good order and quiet, one of the most serious. Such disobedience calls for a power that cannot be stayed or paralyzed in compelling a performance of this duty. The railway refuses to obey; judgment is had against it; it still refuses, it seeks delay; it initiates a writ of error in this court; it proceeds by this method to make the suit expensive,—so much so, if their contention is correct, that the Mills Company will, in all reasonable probability, abandon the quest at such an expenditure and loss. It was just this situation that the Legislature of Kansas intended to correct, and it was this costly and expensive method of obtaining the redress of a wrong at the victim's expense which led Justice GRAY to say:

“—But it is hardly surprising that the owner of a claim of fifty dollars, having been compelled to follow up through all the courts of the State, the contest over this ten-dollar fee, should at last become discouraged and unwilling to undergo the expense of employing counsel to maintain his rights before this court.”

Rd. Co. v. Ellis, 165 U. S. 150, 168.

Double damages awarded against a railway for injuries occasioned by stock entering adjoining lands.

Kingsbury v. Rd. Co., 156 Mo. 379.

"If the laws enacted by a State be within the legitimate sphere of legislative power, and their enforcement be attended with the observance of those general rules which our system of jurisprudence prescribed for the security of private rights, the harshness, injustice and oppressive character of such laws will not invalidate them as affecting life, liberty, or property without due process of law."

Ry. Co. v. Matthews, 165 U. S. 1, 24.

"It is undoubtedly true in general, that this court does follow the decisions of the highest courts of the States respecting local questions peculiar to themselves, or respecting the construction of their own constitutions and laws. But it must be kept in mind that it is only decisions upon local questions, those which are peculiar to the several States, or adjudications upon the meaning of the constitution or statutes of a State, which the Federal courts adopt as rules for their own judgments."

Olcott v. Supervisors, 16 Wall. 689.

In *Railroad Co. v. Seegers*, 207 U. S. 73, at page 78, this court said:

"It may be stated as a general rule that an act which puts in one class all engaged in business of a special and public character, requires of them the performance of a duty which they can do better and more quickly than others, and imposes a not exorbitant pen-

alty for a failure to perform that duty within a reasonable time, cannot be adjudged unconstitutional as a purely arbitrary classification."

The Supreme Court of Kansas in the case of *The Larabee Flour Mills Company v. The Missouri Pacific Railway Company*, 85 Kan. 214, in finally awarding the amount of damages found by the commissioner, decided:

"That the Judiciary Act was not intended to affect and does not affect the jurisdiction of this court. The jurisdiction of this court attaches upon the issue of the alternative writ, and continues unabated not only until the peremptory writ is issued, but until obedience thereto is enforced. . . .

"In view of the undisputed character and importance of the litigation, the services performed and the results obtained, the amounts allowed by the commissioner as attorneys' fees for plaintiff's attorneys are approved. . . .

"That the plaintiff was entitled to recover whatever damages it sustained by the wrongful suspension of the transfer service."

"Mandamus lies in all cases where the plaintiff has a clear legal right to the performance of some official or corporate act by a public officer or corporation, and no other adequate, specific remedy exists."

Smalley v. Yates, 36 Kan. 519.

"The only purpose of a writ of mandamus is to require the person to whom it is issued to perform some

act which the law enjoins as a duty. The writ itself confers no power and creates no duty, and its only office is to command the exercise of a power already possessed, or the performance of a duty already imposed." (Syllabus.)

Sharpless v. Buckles, 65 Kans. 838.

"The true construction of State legislation is a matter of State jurisprudence, and while the right of the national bank springs from the act of Congress, yet it is only a right to have an equal administration of the rule established by the State law. It does not involve a reservation to the national courts of the authority to determine adversely to the State courts what is the rule as to interest prescribed by the State law, but only to see that such rule is equally enforced in favor of national banks."

Bank v. Ry. Co., 163 U. S. 325.

"The 14th amendment means 'that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances.'"

Moore v. Missouri, 159 U. S. 673, 678.

Missouri v. Lewis, 101 U. S. 22.

In this case the mandamus statute of Kansas applied alike to all persons and corporations, demanding the enforcement of a right, and alike in its penalties to all persons or corporations transgressing its provisions; and the contention of the railway company that it was denied the equal protection of the laws of Kansas has nothing in the world to support it. That law

protected every one whose right had been violated, and punished, without exception, discrimination, or specification of class, every violator of its provisions. The scope and purpose of the law under which these damages were awarded, were as comprehensive as to remedy for the one deprived of a right, and against one responsible for such deprivation, as it was in the ability of any legislature to fashion such a law.

The commissioner in his report made to the Supreme Court of Kansas, which report was approved in its entirety, upon the question of damages, decided as follows (Record, pp. 36, 37, 38 and 39) :

"That the action for a mandamus was not based upon nor any right sought to be enforced, predicated upon any duty of the Pacific Company imposed by a statute of Kansas, or any provision of the Inter-State Commerce Act.

"That the duty sought to be enforced by mandamus was not a duty imposed, or sought to be imposed, upon the Pacific Company by this court by its judgment.

"That the duty sought to be enforced by the judgment of this court was a self-imposed duty by the voluntary undertaking of the Pacific Company itself, of furnishing the same and equal facilities to the Mill Company which it at the same time furnished to other persons at the same place similarly situated and conditioned, the common-law duty of a common carrier.

"That this self-imposed duty was not modified or restricted by any provision of the Inter-State Commerce

Act. On the contrary, it was and is provided in Section 3 of that act as follows:

“That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

“Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for their interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their lines and those connecting therewith.’

“That the jurisdiction of this court to enforce the performance of the duty required by the alternative writ, was not affected by the fact that the switching service required comprehended the movement of property the greater part of which was intended by the Mill Company to become, or as a matter of fact would from the initial movement from the mill become, subjects of interstate commerce.

“That the enforcement of the performance of that duty as to articles of property subjects of interstate commerce was not, by express words or by implication, committed to the jurisdiction of the Federal courts.

“That the enforcement of the performance of that duty by a State court is not incompatible with the full and free operation of every provision of the Interstate

Commerce Act, nor incompatible with the discharge of every duty devolving upon, or exercise of every power and authority vested in, the Interstate Commerce Commission by that act.

"That the State courts can exercise concurrent jurisdiction with the Federal courts in cases arising under the Constitution, laws or treaties of the United States, had been determined by repeated decisions of the Supreme Court of the United States.

"The attitude of that court was summed up and stated by Justice BRADLEY in *Claflin v. Housemen*, 93 U. S. 130, in which the question came prominently before that court. It was said:

" 'The general question, whether State courts can exercise concurrent jurisdiction with the Federal courts in cases arising under the Constitution, laws and treaties of the United States, has been elaborately discussed, both on the bench and in published treatises, sometimes with a leaning in one direction and sometimes in the other; but the result of these discussions has, in our judgment, been, as seen in the above cases, to affirm the jurisdiction where it is not excluded by express provision or by incompatibility in its exercise arising from the nature of the particular case.'

"In *Plague Mines v. Henderson*, 170 U. S. 511, it was held that the conferring jurisdiction upon the Federal courts of a certain class of controversies, does not of itself manifest an intention to withdraw from the State courts concurrent jurisdiction of the same class of controversies. In the course of the opinion by Justice HARLAN, it was said:

" 'If it had been intended to withdraw from the State

the authority to determine by its courts all cases and controversies to which the judicial power of the United States was extended, and of which jurisdiction was not given to the National courts exclusively, such a purpose would have been manifested by clear language.' (P. 517.)

"*Western Union Telegraph Co. v. Call Publishing Co.*, 181 U. S. 92, was a case in which the Publishing Company sued the Telegraph Company in a State court of Nebraska for redress for discrimination in news service between the Publishing Company and the Lincoln Journal Company.

"The defense was that furnishing the news service involved was interstate commerce; that Congress alone could regulate it; that Congress not having acted, there was no law requiring the furnishing equal service at equal rates. This contention was denied by the decision, and in the course of the opinion Justice BREWER said:

" 'We are clearly of the opinion that this cannot be so, and that the principles of the common law are operative upon all interstate commerce transactions except so far as they are modified by Congressional enactment.'

Further, he said:

" 'Reference may also be made to the elaborate opinion of Judge Shiras holding the Circuit Court in the Northern District of Iowa, in *Murray v. C. & N. W. R. Co.*, 62 Fed. 24, in which is collected a number of extracts from opinions of this court, all tending to show a recognition of a general common law existing

throughout the United States; not, it is true, as a body of law distinct from the common law enforced in the States, but as containing the rules and principles by which all transactions are controlled except so far as those rules and principles are set aside by express statute.'

'The case of *Murray v. C. & N. W. R. Co.*, 62 Fed. 24, referred to by Justice BREWER, arose upon a discrimination by the Railroad Company, brought in a State court and removed into the Federal Circuit Court under the removal acts of Congress. The question of the jurisdiction of the State court was put in question. In the course of the opinion Judge SHIRAS said:

" 'A further point is made in support of the demurrer, to the effect that this court succeeds only to the jurisdiction of the State court in which the action was originally brought, and that State courts have no jurisdiction over cases arising out of interstate commerce, the argument being that, as the State cannot legislate touching interstate commerce, the State courts are without power to determine cases of the like character. This position is not well taken; the limitations upon the legislative power of the nation and of the several States do not necessarily apply to the judicial branches of the National and State governments. The legislature of a State cannot abrogate or modify any of the provisions of the Federal Constitution, nor of the acts of Congress touching matters within Congressional control, but the courts of the State, in the absence of a prohibitory provision in the Federal Constitution or Acts of Congress, have full jurisdiction over cases arising under the Constitution and Laws of

the United States. The courts of the States are constantly called upon to hear and decide cases arising under the Federal Constitution and laws, just as the courts of the United States are called upon to hear and decide cases arising under the law of the State, when the adverse parties are citizens of different States. The duty of the courts is to explain, apply, and enforce the existing law in the particular cases brought before them. If the law applicable to a given case is of Federal origin, the legislature of a State cannot abrogate or change it, but the courts of the State may apply and enforce it; and hence the fact that a given subject, like interstate commerce, is beyond State legislative control, does not, *ipso facto*, prevent the courts of the State from exercising jurisdiction over cases which grow out of this commerce. Had this action remained in the State court, in which it was originally brought, the court would have had jurisdiction to hear and determine the issues between the parties, because Congress has not enacted that jurisdiction over cases of this character is confined exclusively to the courts of the United States, and therefore the jurisdiction of the State court was full and complete.'

"I conclude that the attitude of the Supreme Court of the United States, as shown by the fact of the decisions above recited having been made, was such that it would have been reasonably probable that the decision of this court would be upheld, even should it be held that the switching service was interstate commerce, unless the appellate court could be convinced that the Interstate Commerce Act had been withdrawn from the State court jurisdiction to enforce a common-

law duty against an interstate carrier and vested the same exclusively in the Federal tribunals.

"The Pacific Company made a great effort to secure such a construction of the act, and forced upon the Mill Company the necessity of abandoning its legal rights, or of meeting the Pacific Company on its own ground and fighting it out on that line."

The further contention of the Railway Company that it was denied due process of law cannot avail it. The matter was tried, argued and decided, according to the ordinary methods of practice, as the record sufficiently shows. The evidence was taken before the commissioner, for both sides; objections were made and argued before him by both sides, and exceptions were also taken by both sides; each side argued its case both as to law and the facts, and when the report was presented to the Supreme Court, both sides were represented, both sides made oral arguments, and then filed printed briefs, and the Supreme Court thereupon took the case under advisement, and after having considered the case, it came to a final decision and judgment, and this decision and judgment this court will find in the case in which only these matters were decided and adjudged, in the 85th Kan. 214 to 226. The railway company has had its day in court, and it cannot prevail on the assertion that its property has been taken without due process of law.

In *R. R. Co. v. Iowa*, 160 U. S. 389, this court, at page 393, said :

"It is also equally evident, provided the form sanctioned by the State law gives notice and affords an opportunity to be heard, that the mere question of whether it was by a motion or ordinary action in no way rendered the proceeding not due process of law within the constitutional meaning of those words."

See also :

Walker v. Sanvinet, 92 U. S. 90.

Head v. Mfg. Co., 113 U. S. 9.

Land Co. v. Laidley, 159 U. S. 103.

Corry v. Campbell, 154 U. S. 629.

In *Davidson v. New Orleans*, 96 U. S. 97, Mr. Justice MILLER, speaking for this court, said (p. 105) :

"It is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has, by the laws of the State, a fair trial in a court of justice according to the modes of proceeding applicable to such a case."

The plaintiff in error in subdividing its contentions into greater detail than was in our judgment necessary, alleged in its 6th, 7th, 10th, 11th and 12th assignments of error that it has been denied the equal protection of the law. We have had occasion to cite some authorities on this feature of the case, and to somewhat give our own views on it.

The law bore on all alike; there was no exception or class. All who were wronged had the same recourse to it and all who violated it were dealt with alike; under like circumstances and under similar situations, there was no class, nor divisions into classes; there were no special persons or corporations on whom it operated, and none were exempted from its provisions, its remedies and its penalties.

"And whenever the law operates alike on all persons and property similarly situated, equal protection cannot be said to be denied."

Walston v. Nevin, 128 U. S. 578, 582.

Barbier v. Connolly, 113 U. S. 27.

Soon Hing v. Crowley, 113 U. S. 709.

In *Hayes v. Missouri*, 120 U. S. 68, Mr. Justice FIELD, speaking for this court, said (pp. 71-2):

"The Fourteenth Amendment to the constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed."

"It was for the Legislature of Ohio to define the public policy of that State in respect to life insurance, and to impose such conditions on the transaction of business by life insurance companies within the State

as was deemed best. We do not perceive any arbitrary classification or unlawful discrimination in this legislation, but, at all events, we cannot say that the Federal Constitution has been violated in the exercise in this regard by the State of its undoubted power over corporations."

Life Ass'n v. Mettler, 185 U. S. 308, 327.

Ins. Co. v. Warren, 181 U. S. 73.

Waters-Pierce Co. v. Texas, 177 U. S. 28.

The railway company, in order to prevail in this case, must say that the Supreme Court of Kansas had no jurisdiction to award the damages complained of. The commissioner allowed a sum that the Mills Company had been put to in maintaining their right to have the railway company open the switch for its business; the Supreme Court of Kansas has decided that this was a part of the remedy in this kind of a suit.

The damages had nothing to do with the jurisdiction of the United States, nor with the Federal Judiciary Act. Were these damages made necessary and were they proximate damages? They undoubtedly were. None of these damages was pretended to have been based on the Federal jurisdiction, on any protection afforded by the laws of the United States, but were based on a domestic suit, under local law, and with which the Supreme Court of the State had sole jurisdiction.

If these damages were awarded as part of the remedy in this suit, and that remedy was provided by law, and extended in its terms, indifferently to all persons and corporations, and the railway company has had its day in court, we cannot see how, or in what way, or whatever the remedy was, or how harsh it may appear to have been, what difference it can make. It was an affair wholly relating to the State of Kansas, in the enforcement of its own laws. When a State court is inhibited from enforcing the mandates of the State law, the army of transgressors will multiply in the land very speedily.

We submit that in this case the final judgment of the Supreme Court of Kansas, affirmed by this court, awarding the peremptory writ of mandamus, *costs and damages*, is as to everything tried or that could have been tried in that case, *res adjudicata*, and the question of damages, item by item, could have been tried originally; and that no Federal question arises in the State court on such final judgment, where the State court applied the remedy provided by law, determined the costs and likewise the damages. Of course, it must be in good faith, and must not under the color and sanctity of the law inflict exceptional or unjust exactions.

"With the correctness of that decision we have nothing to do. It relates only to the construction of a State statute which is in no way in conflict with the Constitution or any law of the United States. The judgment of the State on that question is final, and not reviewable here."

Stryker v. Goodnow, 123 U. S. 527, 536.

Giles v. Little, 134 U. S. 645.

If the damages were assessed by the Supreme Court of Kansas under its construction of the State law, and there is nothing in the provisions of the State law, as it reads or as it has been construed by the Supreme Court of Kansas, in conflict with the Constitution and laws of the United States, under the authority of the case just cited, *Giles v. Little*, 134 U. S. 645, and especially *Stryker v. Goodnow*, 123 U. S. 527, we cannot see how anything remains in this case for argument here. There is nothing in the law that invades the Constitution or laws of the United States; the most the other side can urge is in its application, and these decisions seem to decide very clearly that if such State law is above criticism and does not infract the Constitution and laws of the United States, there is no Federal question as to how it was considered, construed or applied. Of course, it must be so considered, construed and applied in good faith, and must not under the color of its authority be made an

instrument of oppression or inflict unreasonable exactions.

"A State regulates its domestic commerce, contracts, the transmission of estates, real and personal, and acts upon internal matters which relate to its moral and political welfare. Over these subjects the Federal Government has no power. . . . The acknowledged police power of a State extends often to the destruction of property. A nuisance may be abated. Everything prejudicial may be removed."

Mugler v. Kansas, 123 U. S. 623, 658.

"The question of jurisdiction precedes any inquiry into the merits."

Oregon v. Hitchcock, 202 U. S. 60, 68.

"The policy, wisdom, justice and fairness of a State statute is not subject to review or criticism by the Federal Supreme Court."

Hunter v. Pittsburgh, 207 U. S. 161.

"The police power, which is exclusively in the States, is alone competent to the correction of these great evils; and all measures of restraint or prohibition necessary to effect the purpose are within the scope of that authority."

Mugler v. Kansas, 123 U. S. 623, 659.

We might multiply such cases. If the Legislature can destroy a distillery, acquired and operated as a legitimate business, by a change in the law, making the business unlawful, and the law be upheld in this court, confiscating the distillery business, why is not the

power also resident in the court, as a police power, to punish those who are disobedient to its established laws?

We cannot see the point of moral or civic difference in a distiller running his business contrary to law, with a railway refusing to perform its duty in obedience to the command of the law, and the express mandate of the court. The other side have been strenuous, heretofore, in urging that in this case, it was *not* the exercise of the police power of the State to make it pay the damages sustained by reason of its own recalcitrant conduct in refusing to perform its duty.

This court in the case of *Mining Co. v. Pennsylvania*, 125 U. S. 185, decided that the State, on a foreign corporation coming into a state, may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interests. The whole matter rests in their discretion. If the States have this great power to supervise, control and demand of corporations coming into the State, certainly the States would have no less right or power when directed against all persons and all corporations within the State, foreign and domes-

tic alike in its supervision, control and demand as to all. The State has such right. It has the right to assert its right that the laws shall be obeyed, that those who disobey them shall be compelled to obey them, and the State has the right to visit penalties on them, and which the United States has no power or jurisdiction to stay.

If the State Legislature passes a law obligatory on every person or corporation in its territory in a mandamus suit, enforcing a right or duty denied, that a part of the remedy is to make the disobedient or defaulting party pay all damages caused by such default, how can it concern the courts of the United States, or how can it become jurisdictional with the courts of the United States as to how this remedy is ascertained or how meted out? It is an act independent of the Federal jurisdiction. It will not do to say that there is no provision of Federal court or Federal law for the imposition of such damages, and that it would be a handicap, a restraint and an obstacle in the path of litigants, in the free administration of the Federal courts, and would obstruct such administration, by permitting a recovery of attorneys' fees in this court. In our judgment, this would be unreasoning. It was the expenditure of money the outlay and

expense of the Mills Company made necessary by the conduct of the railway company, that was allowed, and the State court, as part of the remedy, had it in its own hands to determine the legitimacy of the expense and allow it.

There is no Federal law contravened; the Constitution of the United States has not been infringed; there is no rule or decision of this court that has been trifled with or disregarded; and above and over all, it is wholly State, relates wholly to its internal affairs, and with which this court has nothing to do.

The act is a valid exercise of the police power vested in the Legislature of the State of Kansas.

Cooley, Const. Law, 572.

Barbier v. Connolly, 113 U. S. 27.

Rd. Co. v. Illinois, 200 U. S. 561.

Mugler v. Kansas, 123 U. S. 623.

Booth v. Illinois, 184 U. S. 425.

Welch v. Swasey, 214 U. S. 91.

Powell v. Pennsylvania, 127 U. S. 678.

Hunter v. Pittsburgh, 207 U. S. 161.

Forsyth v. Hammond, 166 U. S. 506.

Wilson v. N. Carolina, 169 U. S. 586.

In the case of *Barbier v. Connolly*, 113 U. S. 27, Justice FIELD in deciding the case, where the matter at issue was the validity of an ordinance of San Francisco prohibiting the carrying on of washing within

certain prescribed limits, declared that it would be an extraordinary usurpation of the authority of a municipality, if a Federal tribunal should undertake to supervise such regulations; that of the necessity of such regulations the municipal bodies are the exclusive judges; that at least any corrections of their actions in such matters can come only from State legislation or State tribunals; there is no invidious distinction against anyone; that it is not legislation discriminating against anyone; that all persons engaged in the same business within the limits are treated alike; are subject to the same restrictions and are entitled to the same privileges under similar conditions. His words are apt for the case at bar.

We cannot conceive a more urgent call on the power of a State, than to provide a remedy that will be sufficient to not only punish the one who disobeys its command to perform a duty, but to be a deterrent to others; this is what the State law is. The defendant in error has sought no relief whatever of the jurisdiction of this court; the other side has, and it seems to us, that when the Mills Company was required to expend money legitimately and necessarily to the enforcement of its right, the inquiry is secondary as to how or where or under what name the money was expended, with the

proviso that it should be reasonable, necessary and proximate. If the contention of the railway company is right, and that the expenses cannot be recouped, and that in addition to the wrong committed the injured party is to bear the expenses of righting it, it is a reasonable conclusion to say that at such disadvantage the person injured will not attempt to increase his injury by a prosecution for which he must pay the damages suffered.

In reading the comment of many courts on the extent and reach of the police power of the State, it strikes us that such a power is sufficiently broad and comprehensive to embrace every definition given it by the courts; that it is inherent in a State, and is not shared by any other State or by any other jurisdiction; that it extends to all attributes of sovereignty; necessity breeds this power; it goes to the enactment and enforcement of all laws relating to the State or its citizens; it is a power that is only used for beneficial purposes, the public health, the public welfare, which nearly comprises everything of itself; the public peace, the public prosperity, the public comfort, and to compel obedience to its laws, its commands and its mandates; there is no other power that can stay its hand; such power increases in its uses, scope and en-

largements, as the necessities of the State increase by reason of a more complex condition of things, by increasing commerce and population and from the greater wants of a developing and progressive civilization; it is a power that should be limited by reason, applied in good faith, for the public good and the relative rights of all its citizens, and cannot be made an instrument of oppression or discrimination. And when a railway says to one of its patrons, we will not give you a service over a switch, which is given indiscriminately to all the world beside, the infliction of costs and damages, as remedy for such disobedience, is within safe grounds a splendid exercise of this power by the State.

Bucher v. Rd. Co., 125 U. S. 555.

Bacon v. Ins. Co., 131 U. S. 258.

"Nor is it questionable that a fixed and received construction of their respective statute laws in their own courts, makes, in fact, a part of the statute law of the country, however we may doubt the propriety of that construction. It is obvious that this admission may, at times, involve us in seeming inconsistencies; as, where States have adopted the same statutes, and their courts differ in the construction."

Shelby v. Guy, 11 Wheat. 361, 367.

Ex'r v. Quidnick Co., 135 U. S. 457.

While this action as tried in the State court was a civil action, using the extraordinary process of mandamus to enforce its judgment, yet in applying the remedy given by the State law, it was as well penal in its nature, and as we think, necessarily and absolutely a local matter, which this court has no jurisdiction over, no power nor authority whatever. The State court under a State law may use the method prescribed by the law, and whatever that method may be, if applied alike to its enforcement and punishment, this court can have no jurisdiction. In applying the remedy in the assessment of damages, which the Supreme Court of Kansas declared was a part of the remedy, whatever rule it may use, is its own rule, and it cannot be in any way a matter of concern or jurisdiction with this court. The learned counsel who represents the railway company has asserted in one of his briefs (Record, p. 228), that "The action was in no sense one to enforce the police power of the state or a police regulation of any kind." The simple statement is sufficient in reply to such an assertion, that to enforce obedience by the infliction of damages as part of the remedy, must be conceded to be the exercise of the police power of the State. Judge COOLEY in Constitutional Law 572, states the definition and

scope of the police power of the State. He says that the police power of a State—

“Embraces its system of internal regulation by which it is sought not only to preserve the public order and to prevent offenses against the State, but also to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights and to insure to each the uninterrupted enjoyment of his own, so far as is reasonably consistent with a like enjoyment of rights by others.”

The one other proposition of the railway company, that the Mills Company belonged to an illegal trust under the anti-trust laws of the United States and the State of Kansas as well, we believe cannot prevail for the following reasons:

1. It had that defense at the time of the trial, and did not present it in pleadings or argument, and it was not until after the judgment had been rendered that the railway company presented it before the commissioner.

2. Both this court and the Supreme Court of Kansas have decided that unless the controversy is bottomed upon the trust agreement, and it is made necessary in the suit to sustain the trust before a plaintiff can recover, it cannot be relied on as a defense.

This action was not based on any trust agreement; it related to the ordinary business of the Mills Company.

3. The railway company introduced a large volume of testimony before the commissioner, and it has printed much of it in the record, and the commissioner found as a fact that the testimony did not sustain that proposition; and further found, that the Mills Company was not a member of such illegal trust, and the Supreme Court of Kansas found the same fact by its approval of the report of the commissioner. Therefore, we assert, that the plaintiff in error is bound in this proceeding by such finding of fact by the State court, that it cannot relitigate it here, and that under the writ of error prosecuted by it, this court accepts as final the findings of fact as to that matter made by the State court.

In view of the finding of the State court that the evidence was not sufficient to show that the Mill Company was a member of any illegal trust, the language of this court in the case of *Dower v. Richards*, 151 U. S. 658, at page 670, clearly shows that the plaintiff in error has no right to a writ of error upon the alleged question of the Sherman anti-trust act. It was there said by this court:

"In *Crary v. Devlin*, (decided February 21, 1876,) in an action to recover the price of alcohol sold, the de-

fendants contended that the sale was unlawful because of a violation of the internal revenue laws of the United States. The Court of Appeals of New York gave judgment for the plaintiff, because no such violation was proved; and this court dismissed the writ of error, upon the authority of *Boggs v. Mining Co.*, above cited, Chief Justice Waite saying: "There could have been no decision of the Court of Appeals against the validity of any statute of the United States, because it was found that the facts upon which the defendants below relied to bring their case within the statute in question did not exist. The judgment did not deny the validity of the statute, but the existence of the facts necessary to bring the case within its operation. (23 Lawyers C. P. Co.'s Rep. 510, 511.)"

Referring to the defense of the Sherman Anti-trust law, we call the court's attention to the language in the leading case of *Connolly v. Pipe Co.*, 184 U. S. 540, at page 552:

"It is sufficient to say that the action which it authorizes must be a direct one, and the damages claimed cannot be set off in these actions based upon special contracts for the sale of pipe that have no direct connection with the alleged arrangement or combination between the plaintiff and other corporations, firms or companies."

It might be proper to say that under the Sherman anti-trust law, treble damages can be awarded in a direct action against the one who violates that law,

and which is much harsher than the punishment visited on the one who violated the command of the law and refused to operate the switch by making it pay the costs of its opposition.

In the case of *Barton v. Mulvane*, 59 Kan. 313, an ordinary action in replevin by a corporation to recover property from the possession of the defendant upon which a small portion of the purchase-price only had been paid, and after default by the defendant, an attempt was made to introduce evidence to show that the plaintiff was a member of an unlawful combination to control the output and price of salt. It was held, affirming the judgment of the lower court, and construing the anti-trust act of the State of Kansas, that the testimony was properly rejected. It was said:

"Section 5, chapter 257, Laws of 1889, providing that when actions are begun in this State, it shall be lawful in defense thereof to plead in bar or in abatement that the plaintiff, or any other person interested in the prosecution of the case, is a member or agent of an unlawful combination or trust, applies to actions which will promote the purposes of the unlawful combination or trust, or which grow out of the same, or some contract or business transaction thereof, but was not intended to deprive the plaintiff of the right to resort to the courts for the protection of property, rights and interests in no way connected with such combination or trust."

In the discussion of the proposition so advanced by the railway company, that the defense made before the commissioner, and then before the Supreme Court of Kansas, that the Mills Company was a member of an illegal and denounced trust under the anti-trust laws of the United States, and that by reason of such membership it had no standing in this court, nor in the State court, we again call the attention of this court to the fact as shown by the record that the commissioner found against such contention as a matter of fact, so reported, and the Supreme Court of Kansas affirmed such report. Under the repeated decisions of this court, such findings were and are a finality in this court, and cannot be reviewed in this court on a writ of error.

The writ of error can bring up only questions of law and not of fact. (*Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86, 97, and cases cited.) When the State court has found the facts, this court is concluded by such finding. (*Egan v. Hart*, 165 U. S. 188.) This court has declared in the case of *King v. W. Va.*, 216 U. S. 92, that it is hardly necessary to add that on a writ of error this court does not deal with the facts. The rule that the decision of a State court upon a pure question of fact cannot be reviewed by the Supreme

Court of the United States on a writ of error, has been conclusively determined by this court in many cases.

Simply reviewing what we have attempted to state, we assert that the law under which this proceeding was had is wholly without the jurisdiction of this court and wholly within the jurisdiction of the State court; that the defendant in error has invoked no protection under the Constitution and laws of the United States; that the State gave it a remedy; that it has pursued it under the terms of such law as decided by the Supreme Court of Kansas; that this particular law gave it as a part of his remedy, the payment to it of damages that it necessarily incurred in obtaining its right, of which the State was the sole judge; and that if the Supreme Court in computing the damages used the yardstick of the United States and called it attorneys' fees for services rendered in this court, it had the right to use the same, and where it allowed a sum, we care not how computed, it was as money allowed which the defendant in error had spent and which by its own judgment was regained from its tortfeasor; that this law invoked the police power of the State to compel obedience; that it required the exercise of its police power to obtain obedience; that the State has just as strong an arm to compel obedience to its laws

as it has to abate a nuisance; and that in the essential and necessary exercise of that power, there is no reasonable limitation; that the defendant in error is wholly outside the pale of the Federal Judiciary Act, and could not in any way have invoked its protection; that the plaintiff in error has had its day in court and been given the due process of the law; that it has had the equal protection of the law, whose terms were open to all persons and corporations under like condition and circumstance; and finally, for the various grounds presented by us, the anti-trust feature is not in this case for any purpose.

Respectfully submitted.

JOSEPH G. WATERS,

CHARLES BLOOD SMITH,

JOHN C. WATERS,

JOHN F. SWITZER,

Attorneys for Defendant in Error.

135
No. ~~470~~¹⁵

No. ~~878~~

U. S. SUPREME COURT, D. C.
FILED.

DEC 30 1912

JAMES H. MCKENNEY,

CLERK.

In the
Supreme Court of the United States
October Term, 1911.

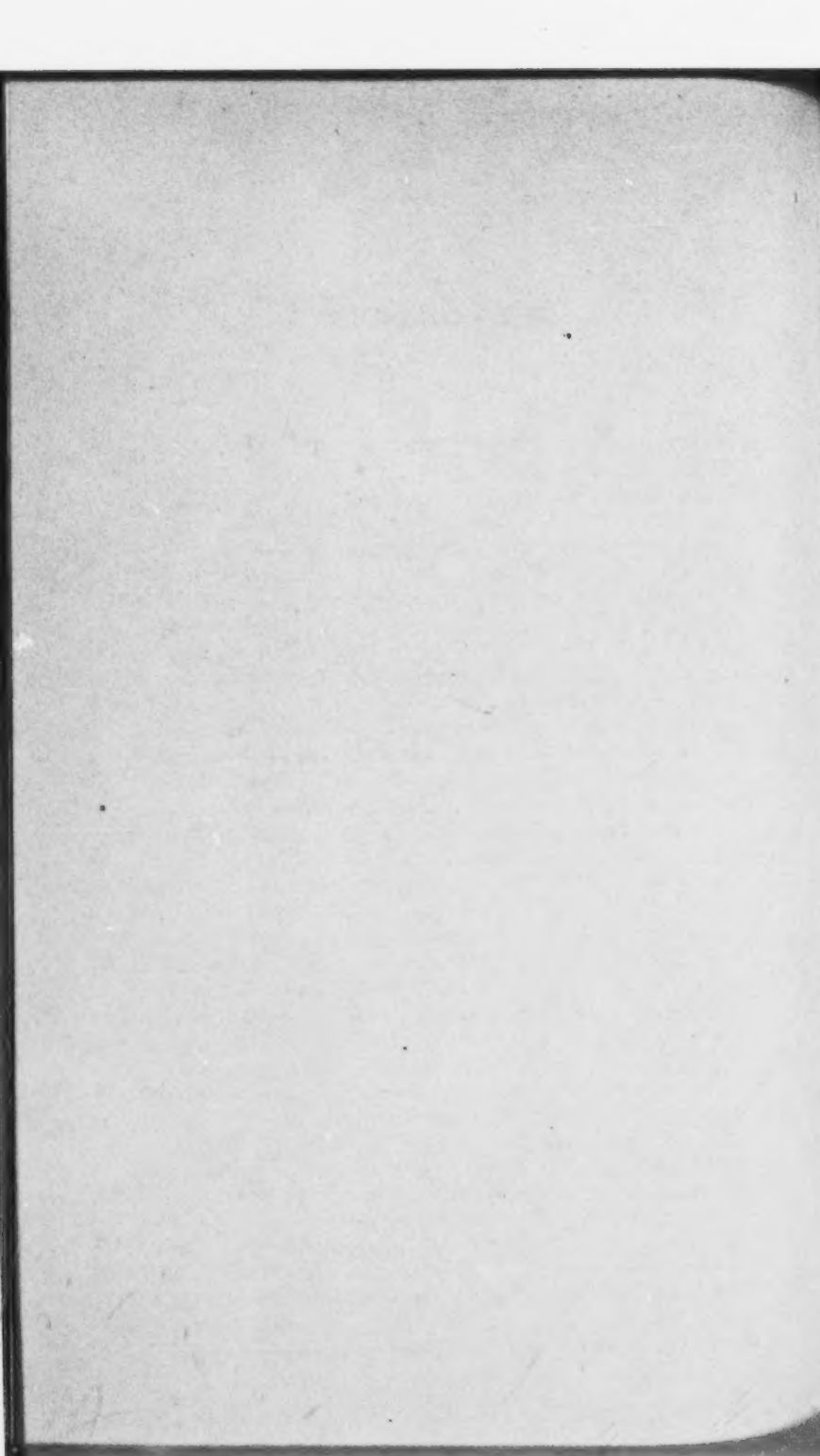
THE MISSOURI PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

VS.

F. D. LARABEE AND F. S. LARABEE, Partners in Business
Under the Style and Firm Name of THE LARABEE
FLOUR MILLS COMPANY,
Defendants in Error.

BRIEF OF PLAINTIFF IN ERROR.

B. P. WAGGENER,
Attorney for Plaintiff in Error.



SUBJECT INDEX.

	Page.
Statement of Case.....	1-11
Assignment of Errors.....	12-15
First Specification of Errors relied upon by Plaintiff in Error.	16-18
Brief and Argument on First Specification of Error, contending that Section 5193, Gen. Stat. Kan. 1901, as construed by Supreme Court of Kansas in <i>McClure v. Scates</i> , 64 Kan. 284, was unconstitutional and void, and in conflict with the Fourteenth Amendment to the Constitution of the United States, and denied to the defendant the equal protection of the law, and deprived it of its property without due process of law, etc.....	19-49
Copy of Kansas Statute relied upon by the Mill Company	19
Finding of fact that Mill Company was under no legal obligation to attorneys to pay attorneys' fees, unless recovered in action against Railway Company.....	23
Amended statement of claim for damages filed in Supreme Court of Kansas.....	24
Amount allowed by Commissioner and Court.....	25
Second Specification of Error.....	49-50
Brief and Argument on Second Specification of Error, in which State Supreme Court decided, contrary to contention and claim of plaintiff in error, that Judiciary Act of Congress (Secs. 999, 1000, 1003, 1010, Compiled Statutes U. S. 1901) did not deprive Supreme Court of Kansas of jurisdiction to assess damages against defendant alleged to have accrued after the rendition of final judgment by it, and after such judgment had been superseded, as provided by said Judiciary Act, and was pending in Supreme Court of the United States; and in holding that the allowance of writ of error did not operate to remove the suit from the Supreme Court of the state to the Supreme Court of the United States; and that the Mill Company might recover in this proceeding damages and expenses, including attorneys' fees, which accrued after the giving of the	

INDEX—Continued.

	Page.
supersedeas bond, and during the time said proceedings were pending in Supreme Court of the United States.	49-81
Sections of Judiciary Act, under which plaintiff in error claimed immunity.	61-62
Third Specification of Error.	81
Brief and Argument in support of contention that Supreme Court of Kansas erred in refusing to enter judgment in accordance with mandate of Supreme Court of the United States, and refusing to give full force and effect to such mandate, and in entering a different judgment against plaintiff in error than it was authorized by said mandate to enter, and in so doing disregarded the constitutional laws of the United States.	81-90
Fourth Specification of Error.	90
Brief and Argument in support of contention that Supreme Court of Kansas erred in holding and deciding that the Act of Congress, entitled "An Act to protect trade and commerce against unlawful restraint and monopoly," did not preclude the Mill Company from recovering herein, although a member of such unlawful combination.	90-108
Fifth Specification of Error.	109
Brief and Argument in support of contention that Supreme Court of Kansas was without any jurisdiction to render judgment against defendant in error for any amount, and in assuming to render such judgment, depriving the Railway Company of its property without due process of law, and denying to it the equal protection of the law.	109-122
Recapitulation.	123-133

ALPHABETICAL TABLE OF CASES CITED IN BRIEF.

Amory v. Amory, 94 U. S. 100.	68
Assurance Co. v. Bradford, 60 Kan. 82.	29-31-46
Atkinson v. Woodmanse, 68 Kan. 71.	30-78-111-112
Arcambel v. Wiseman, 3 Dallas 306.	35-64
Avery v. Popper, 179 U. S. 305.	75
Ayers v. Commrs., 37 Kan. 240.	87
Addyston Pipe Co. v. U. S., 175 U. S. 211.	105

INDEX—Continued.

	Page.
Burrus v. Hines, 94 Va. 414.....	39
Bishop v. Hendrick, 31 N. Y. Supp. 502.....	44
Boyce v. Grundy, 9 Peters 275.....64, 65, 119, 121, 128	
Bank of U. S. v. Moss, 6 How. 31.....	66
Bell v. Campbell, 17 Kan. 212.....	30
Bull v. Keenan, 100 Iowa 144.....	36
Barnard v. Poor, 21 Pick. 378.....	37-38-40
Boardman v. Grocer Co., 105 Iowa 451.....	37
Bein v. Heath, 12 How. 168.....	75
Bank v. Jenkins, 107 Ill. 291.....	77
Bank v. Aetna Ins. Co., 76 Fed. 550.....	82-121
Brenner v. Bigelow, 8 Kan. 497.....	83
Brookover v. Esterly, 12 Kan. 152.....	83
Bement v. Natl. Harrow Co., 186 U. S. 70.....	95
Clason v. Nassau Ferry Co., 45 N. Y. Supp. 675.....	44
Chicago v. Honey, 10 Ill. App. 535.....	48
C., etc., Ry. Co. v. Minn., 134 U. S. 456.....	20
Cable v. Dakin, 20 Wend. 172.....	30
Clark v. Wolfe, 115 Ga. 320.....	36
Cox v. U. S., 6 Pet. 172.....	76
Crans v. Francis, 24 Kan. 754.....	83
Coal Co. v. Brick Co., 52 Kan. 748.....	90
Conelly v. Union Sewer Pipe Co., 184 U. S. 540.....	95
Coppell v. Hall, 7 Wall. 558.....	103-106
Cont'l Wall Paper Co. v. Voight, 212 U. S. 254.....	105
Day v. Woodward, 13 How. 363.....	40
Durant v. Essex Co., 101 U. S. 555.....	65
Draper v. Davis, 102 U. S. 370.....	70
Doom v. Curran, 52 Kan. 360.....	30-43
Durkes v. Janesville, 28 Wis. 464.....	34
Day v. Woodworth, 13 How. 370.....	35-74
Dorris v. Miller, 105 Iowa 568.....	37
Duncan's Heirs v. U. S., 7 Pet. 435.....	76
Dower v. Richards, 151 U. S. 658.....	96
Drexler v. Tyrrell, 15 Nev. 114.....	107
Eatman v. R. R. Co., 35 La. Ann. 1018.....	38
Earl v. Tupper, 45 Vt. 287.....	39
Ex parte D. & P. R. R., 1 Wall. 69.....	65
Embrey v. Jennison, 131 U. S. 336.....	95
Fairbanks v. Watters, 18 Wis. 302.....	40

INDEX—Continued.

	Page.
Felix v. Schanneber, 125 U. S. 59.....	63-71
Fid. Mut. Assn. v. Mettler, 185 U. S. 308.....	29-31-42
Froer v. People, 141 Ill. 171.....	33
Falk v. Waterman, 49 Cal. 224.....	36
Gates v. Toledo, 57 Oh. St. 105.....	39
Golder v. Land, 50 Neb. 868.....	47
Gulf, Col. & S. F. v. Ellis, 165 U. S. 153.....	32-33-110-131
Goodbar v. Lindsay, 51 Ark. 382.....	36
Gibbs v. Diekma, 131 U. S. Appendix CXC VII.....	82
Gaines v. Rugg, 148 U. S. 223.....	82
Gille v. Emmons, 58 Kan. 118.....	84
Gepan v. Stephenson, 18 Kan. 146.....	85
Gaston v. Drake, 14 Nev. 175.....	107
Henry v. Davis, 123 Mass. 346.....	39
Haverstock v. Gas Co., 29 Pa. St. 254.....	39
Hicks v. Foster, 13 Barb. 663.....	40
Himely v. Rose, 5 Cranch. 313.....	66
Howell v. Scroggins, 48 Cal. 355.....	36
Hanauer v. Doane, 12 Wall. 346.....	104-105
In re Washington, 140 U. S. 96.....	65, 82, 119, 121, 128
In re R. R. v. Wynne, 224 U. S. 354.....	69
Irlbeck v. Bierl, 101 Iowa 240.....	37
In re Sanford, 160 U. S. 247.....	82
In re Potts, 166 U. S. 263.....	82
In re Blake, 175 U. S. 114.....	82
Joliffe v. Brown, 14 Wash. 155.....	33
Janesville v. Carpenter, 77 Wis. 288.....	34
Jacobson v. Poindexter, 42 Ark. 97.....	36
Jayne v. Drorbaugh, 63 Iowa 711.....	37
Knefel v. Ahem, 57 Ill. App. 569.....	41
Kelley v. Rogers, 21 Minn. 147.....	42
Keyser v. Farr, 105 U. S. 265.....	70
Knox v. Knox, 12 N. H. 352.....	77
K. P. Ry. v. Wood, 24 Kan. 619.....	79-80
K. C. S. Ry. v. Albers Com. Co., 223 U. S. 573.....	95
Lincoln v. S. & S. R. Co., 23 Wend. 425.....	40
Larabee v. Mo. Pac., 85 Kan. 214.....	72
Lafferty v. R. R. Co., 71 Mich. 35.....	33

INDEX—*Continued.*

	Page.
Loeb v. Columbia Tp., 179 U. S. 472.....	95
Loewe v. Loewe, 208 U. S. 283.....	105
Maisenbacker v. Society, 71 Conn. 378.....	42
Mason v. Hawes, 52 Conn. 12.....	42
McKenzie v. Mitchell, 123 Ga. 72.....	42
Mattlage v. R. R. Co., 17 N. Y. Supp. 537.....	43
Morris v. Grand Ave., 144 Mo. 500.....	48
Mo. Pac. v. Larabee, 68 Kan. 74.....	32
Mo. Pac. v. Larabee, 211 U. S. 612.....	9-24-123
McClure v. Scates, 64 Kan. 284.....	
.....13, 16, 19, 49, 89, 109, 110, 131, 126, 112, 113	
Madden v. Smith, 28 Kan. 801.....	90
Mackay v. Dillon, 4 How. 421.....	96
Mitchell v. Woods, 17 Kan. 28.....	101
McMullen v. Hoffman, 174 U. S. 639.....	106
McNeil v. S. Ry. Co., 202 U. S. 543.....	123
Noftzger v. Moffett, 63 Kan. 354.....	54
Nightingale v. Scammell, 18 Cal. 315.....	30
Newell v. Danford, 13 Iowa 463.....	37
Newby v. Myers, 44 Kan. 477.....	84
Natl. Distilling Co. v. Cream Co., 86 Wis. 352.....	95
Oelrichs v. Spain, 15 Wall. 230.....	34-37-69
Oscanyan v. Arms Co., 103 U. S. 267.....	107
Phelps v. Owen, 12 Cal. 22.....	30
Planders v. Tweed, 15 Wall. 150.....	37
Prouty v. Stover, 11 Kan. 235.....	86
Price v. Bank, 62 Kan. 735.....	88-90-117
R. R. Co. v. R. R. Co., 77 Ark. 137.....	43
Rose v. Himely, 5 Cranch. 313.....	65
Ry. Co. v. Foley, 94 U. S. 100.....	68
R. R. Co. v. Mathews, 58 Kan. 447.....	29, 31, 45, 46
R. R. Co. v. Mower, 16 Kan. 573.....	29
Ry. Co. v. Williams, 49 Ark. 492.....	33
Ry. Co. v. Rummells, 77 Mich. 104.....	33
Ry. Co. v. Baty, 6 Neb. 37.....	33
Reynolds v. Stockton, 140 U. S. 254.....	84
R. R. Co. v. Beebe, 39 Kan. 465.....	89
Ry. Co. v. Conlon, 77 Kan. 324.....	91

INDEX—Continued.

	Page.
Spencer v. Murphy, 6 Colo. App. 453.....	42
Sharpless v. Buckles, 65 Kan. 838.....	57
Slaughter House Cases, 10 Wall. 273.....	70
State v. Ry. Co., 76 Kan. 501.....	25-111
S. & N. Ry. Co. v. Morris, 64 Ala. 193.....	32
Stimson v. R. R. Co., 1 Wall. Jr. 164.....	73
Schroeder v. Merchants, 104 Ill. 171.....	77
State of Kansas v. Thomas, 76 Kan. 447.....	77
State v. Campbell, 73 Kan. 638.....	80
State v. County, 11 Kan. 69.....	83
Shawnee Co. v. Carter, 2 Kan. 116.....	86
Shattuck v. Chandler, 40 Kan. 520.....	86
State v. Bancroft, 22 Kan. 170.....	86
Stanley v. Schwalby, 162 U. S. 255.....	96
State v. Winner, 17 Kan. 298.....	97
Swift & Co. v. U. S., 196 U. S. 375.....	105
Smiley v. Kansas, 196 U. S. 447.....	105
Sheldon v. Pruessner, 52 Kan. 589.....	107
 The Santa Maria, 10 Wheat. 431.....	65-66
Tullock v. Mulvane, 184 U. S. 512.....	72-73
Tess v. Huntington, 23 How. 2.....	35
The Baltimore, 8 Wall. 378.....	35-73
Tyler v. Maguire, 17 Wall. 253.....	82
 Underhill v. Spencer, 25 Kan. 71.....	48
U. S. v. Addison, 22 How. 185.....	67, 119
U. S. v. Trans. Mo. Frt. Assn., 166 U. S. 291.....	103
 Valentine v. Stewart, 15 Cal. 389.....	107
 Washburn v. Burke, 84 Ill. App. 589.....	41
Winkler v. Roeder, 23 Neb. 706.....	43
Whitney v. Cook, 99 U. S. 607.....	68
Wiley v. Keokuk, 6 Kan. 94.....	30
Wilan v. R. R. Co., 70 Mich. 384.....	33
Whittemore v. Cutter, 1 Gall. 429.....	73
West v. Lumber Co., 56 Kan. 287.....	78
Wisler v. Miller, 53 Kan. 515.....	90
Wilcox v. Ellis, 14 Kan. 588.....	107
Winstead v. Hulme, 32 Kan. 573.....	112
 Yick Wo v. Hopkins, 118 U. S. 373.....	20-21

In the
Supreme Court of the United States

October Term, 1911.

THE MISSOURI PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

VS.

F. D. LARABEE AND F. S. LARABEE, Partners in Business
Under the Style and Firm Name of THE LARABEE
FLOUR MILLS COMPANY,
Defendants in Error.

No. 878.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF CASE.

This controversy has been under consideration by this Court before. (*Mo. Pac. Ry Co. v. Larabee Mills*, 211 U. S. 612.)

On September 15th, 1906, the Larabee Flour Mills Company (hereinafter called the "Mill Company") filed its application in the Supreme Court of Kansas for an alternative

writ of mandamus compelling the Missouri Pacific Railway Company (hereinafter called the "Missouri Pacific") to restore, resume and make transfer of cars between the lines of the Atchison, Topeka & Santa Fe Railway Company (hereinafter called the "Santa Fe") and the mill and elevators of the plaintiff, situated in the town of Stafford, Kansas. (See diagram, 211 U. S., p. 613.) Upon the filing of this application, and the answer and return of the Missouri Pacific, the matter was referred to a commissioner, who reported his findings of fact to the court, which findings, so far as material to the subject matter of this controversy, are as follows, viz.: (See Rec., pp. 2-8.)

"Second. Stafford is a flourishing town of 1600 people, in Stafford county, Kansas, surrounded by a large scope of country productive of large annual crops of wheat. The Missouri Pacific and the Santa Fe have a line of railroad running practically east and west through Stafford, with freight and passenger stations and side tracks and station facilities thereat.

The Mill Company has, and for more than four years has had, a flouring mill of one thousand barrels daily capacity, and continuously operates this mill, except on Sundays. This mill is located alongside the tracks of the Missouri Pacific, and a short distance from its freight station. The tracks and freight stations of the two roads are separate a distance of one mile, and the Santa Fe station and station facilities are one mile from the mill. The Mill Company ships from its mill over these two roads substantially its entire product—three-fifths of which is so shipped out of the state of Kansas and into other states, and two-fifths to points within the state of Kansas. The Mill Company purchases a large portion of its grain at Stafford, which is delivered in wagons at the mill; and purchases a large portion of its grain at points distant from Stafford, all of which is shipped to it in carload lots over these two roads, and delivered to it at the mill by the Missouri Pacific. The Mill Company sells its product to dealers, and the larger portion of its output is shipped to customers most conveniently reached

by shipping from Stafford by the Santa Fe, and a large portion is shipped to customers most conveniently reached by shipping from Stafford by the Missouri Pacific.

Third. The Missouri Valley Car Service and Storage Association is an unincorporated voluntary association of a number of railroad companies, having a manager and other employees. The object and the duty of this association is to represent, serve, protect the interest and enforce the rights of the members thereof in the matter of the interchange of freight cars, the prompt loading, unloading and return of cars interchanged or delivered to shippers, for traffic purposes.

This association has been in operation for many years and from a time prior to any of the transactions mentioned in this investigation, and its objects and operations and methods have been generally understood by commercial shippers by carload lots, and generally acquiesced in as a proper instrument for securing to the shipping public the greatest amount of service from the available car supply of the roads composing it. The association has adopted and had in effect since January 1st, 1904, a body of rules, a printed copy of which accompanies these findings.

Fourth. The lines of the Missouri Pacific and the Santa Fe intersect at a point one mile distance westwardly from the mill and the Missouri Pacific station, and the same distance from the Santa Fe station. As near as practicable to the intersection, the Santa Fe, in the year 1903, constructed, at its own expense, a transfer track from a connection with its own to a connection with the Missouri Pacific line. At that point, and for a half mile eastward, the Missouri Pacific line is located in Prairie avenue, a public street of Stafford, and no part of the transfer track is owned by the Missouri Pacific, or on its right of way or private ground. No express contract is shown to exist between the two railroad companies requiring either to use or to permit the other to use the transfer track, or requiring either to place empty or loaded cars thereon, to be taken away or returned by the other. In order for the Missouri Pacific to take cars from the said transfer track which had been placed thereon by the Santa Fe, or return such cars thereto, it is necessary for it to go entirely off its own track and right of

way, both in going after cars standing on said Santa Fe transfer track, and in setting loaded cars on the same; the Missouri Pacific not owning and having no control over any part of the said track or of the right of way over which it passes.

Fifth. Immediately after the construction of the transfer track, the Santa Fe began to place thereon empty cars, to be by the Missouri Pacific taken therefrom, and placed for loading with flour at the Mill Company's mill, or at such convenient position as to enable the Mill Company, with its own force, to place them at the mill for such loading. At the same time the Missouri Pacific began to take such empty cars from the transfer track and place them for loading with flour at the mill, or in such position as to enable the Mill Company, with its own force, to place them at the mill for such loading; and on notice that such cars were loaded ready for shipment, to return them to the transfer track, to be taken possession of by the Santa Fe. The practice in this matter was, when the Mill Company desired to ship flour from its mill by the Santa Fe, it placed its order with the Santa Fe for the number of cars desired; the latter would place the cars on the transfer track; the Missouri Pacific would then place them at the mill, and when the cars were loaded return them to the transfer track, charge the Santa Fe two dollars per car for the service, notifying it of the switching; the Santa Fe would take the cars, bill them to destination, collect all freight, and pay the Missouri Pacific its switching charges. In no instance did the Missouri Pacific issue bill of lading, way bill, or receipt, or present or collect bills for freight or switching charges.

Sixth. When the Santa Fe received cars loaded with wheat consigned to the Mill Company it placed them on the transfer track; the Missouri Pacific placed them at the mill; the Mill Company unloaded the wheat from them, and reloaded them with flour, and the same practice was followed as in the case of empty cars brought in from the Santa Fe.

Seventh. In making its application to the Santa Fe for cars, in no instance did the Mill Company make a deposit of any part of the freight, and in no instance was a deposit of any part of the freight demanded. In receiving orders for furnishing, transferring or returning

cars, as hereinbefore outlined, in no instance was any distinction made between cars intended to be used in carrying flour to points out of the state, and cars intended to carry to points within the State of Kansas.

Eighth. The custom and practice described in the fifth and sixth paragraphs prevailed as to both empty and loaded cars from the time the transfer track was constructed uninterruptedly until August 29, 1906; and prevails to the present time in favor of the Mill Company as to cars loaded with wheat consigned to the Mill Company; and still prevails in favor of all industries located on the Missouri Pacific at Stafford, making shipments in or out over the Santa Fe in carload lots, except the Mill Company.

Ninth. I find as a fact that the Santa Fe and the Missouri Pacific hold themselves out, and undertake to place for loading on the Missouri Pacific tracks located on the Missouri Pacific line at Stafford, all cars furnished by the Santa Fe required for the shipment of freight in carload lots out over the Santa Fe; and also hold themselves out and undertake to likewise place all loaded cars consigned over the Santa Fe to industries located on the Missouri Pacific at Stafford.

Tenth. From December 12, 1905, to April 26, 1906, fifty-two cars taken empty from the transfer track by the Missouri Pacific, and placed at or near the mill for loading, were detained after the expiration of forty-eight hours from 7 a. m. of the day following their placing, before they were loaded by the Mill Company, and ready to be returned to the transfer track. The total time of such detention was equivalent to the detention of one car eighty-six days. The agent of the Missouri Pacific, acting under the direction of the Car Service Association, which for this purpose represented both the Santa Fe and the Missouri Pacific, assessed against the Mill Company a car service or demurrage charge of one dollar per day for each day each of said cars was so detained after the expiration of free time, which assessment amounted to a total charge of \$86.

From July 24 to August 14, 1906, twenty-nine cars loaded with wheat taken by the Missouri Pacific from the transfer track, and placed at or near the mill to be unloaded and reloaded with flour, were detained after the

expiration of the free time allowed, before they were reloaded and ready to be returned to the transfer track. The total time of such detention was equivalent to the detention of one car 104 days.

The agent of the Missouri Pacific, acting as above, added to the free time to be allowed these cars to the extent of twenty-six days, for the reason that the Missouri Pacific wholly failed to do any switching or placing of cars on July 26th, when there were five cars, and on July 27th, when there were six cars, and on July 30th, when there were fifteen cars, requiring switching and placing; and thereupon assessed against the Mill Company car service charges on account of such detention amounting in the aggregate to \$78.

Eleventh. After the car service charges on the loaded cars had been assessed, the agent of the Missouri Pacific, under instructions from the Car Service Association, demanded of the Mill Company the payment of the whole of the car service charges assessed, both the \$86 on account of empty and the \$78 on account of loaded cars. Thereupon the Mill Company offered to pay the \$86 on account of the empty cars, and refused to pay the \$78 on account of loaded cars, basing its refusal on the ground that the delay and detention of the cars was not caused by its fault, but was caused by the defective, insufficient and inadequate service of the Missouri Pacific in placing the cars for unloading and reloading.

The agent of the Missouri Pacific, under the instruction of the Car Service Association, refused to accept the \$86, or any sum less than the whole of the two amounts, and demanded the payment of the whole of the two amounts, with the understanding that the Mill Company might present a claim for the return of any excess charges it claimed had been made, which claim would be investigated by the Car Service Association, and, if it found excess or unjust charges had been assessed, the amount so found would be refunded to the Mill Company. The Mill Company still refused to comply with that demand.

Twelfth. On August 29, 1906, and after the Mill Company had refused to make payment of the entire claim for car service charges, the Missouri Pacific, by the direction of the Car Service Association, ceased and refused to make further delivery to the Mill Company of empty

cars placed on the transfer track for the use of the Mill Company by the Santa Fe, and still refuses to make such delivery. The only object and purpose of the Car Association in directing, and of the Missouri Pacific in the refusal, to make such further delivery of such empty cars to the Mill Company, is to compel it to pay the whole of both amounts of car service charges, under the understanding described in paragraph eleven, by the enforcement of the rules of the Car Service Association. The refusal to make such delivery was not based upon a claim that the compensation paid for the service was not satisfactory, nor upon a claim that any part of such service constituted a part of interstate commerce, nor upon a claim that the Missouri Pacific did not undertake to perform such service.

Thirteenth. As a result of the refusal to make delivery of empty cars, as described in paragraph twelve, the Mill Company, when desiring to ship any of its products from Stafford by the Santa Fe, is compelled to haul the same in wagons from its mills to the station of the Santa Fe, and load into cars from wagons. This entails upon the Mill Company great inconvenience, and great additional expense in the management of its business.

Fourteenth. During the period covered by the car service charges on loaded cars constituting the \$78 so demanded, an unusual and heavy demand was being made upon the Missouri Pacific for the transportation to market of a newly harvested crop of wheat then ready for market, along that portion of its line from Conway Springs to Larned, in Kansas. The freight service on that portion of its line was performed throughout the year—a single engine and train crew passing from Conway to Larned and return. The transfer and switching service performed by the Missouri Pacific hereinbefore described was performed by this single engine and crew. Ordinarily, and by the train schedule, this engine and crew passed through Stafford, and performed such transfer and switching service once in the early part and once in the latter part of each day except Sunday, and, when so performed with reasonable promptness and regularity, this single engine and crew were capable of performing the service to the satisfaction of the Mill Company. The engine so used was old, and frequently defective and out of repair. The sin-

gle engine and crew were not sufficient or equal to meet the unusual demand of the business of that part of the line during the period mentioned, and perform the transfer and switching service in question with promptness or regularity.

During the period mentioned, the Mill Company made its applications from time to time to the Santa Fe for such number of cars, in addition to the loaded cars consigned to it, which it might reasonably anticipate would arrive at the same time, as it deemed necessary in its business, but not for a greater number of cars to be delivered at one time than, together with such loaded cars, it could load within the free time allowed, if such empty and loaded cars were properly placed with reasonable promptness.

Fifteenth. The crowded condition of the business on the Missouri Pacific during that period, and the general character of its motive power and train crew, were well known to its agent, as well as to the Santa Fe and to the Mill Company.

When the Mill Company placed its applications for cars with the Santa Fe, it could not certainly know the day on which they would be placed on the transfer track, or know with certainty on what day loaded cars consigned to it over the Santa Fe would arrive and be placed on the transfer track; or know that at such times such cars could not be properly placed by the Missouri Pacific with reasonable promptness, and removed when reloaded with like promptness. The Missouri Pacific did not better or increase its motive power or train service to meet the increased and unusual demand of its business during the period mentioned.

Sixteenth. I find as a fact that the detention of the loaded cars beyond the free time allowed, on account of which the disputed car service to the amount of \$78 was assessed against the Mill Company, was caused as much by the fault and defective motive power and insufficient train service of the Missouri Pacific as from any fault or omission on the part of the Mill Company.

Section 2 of Rule XI and Section 1 of Rule X of the Missouri Valley Car Service Association reads as follows:

'SECTION 2. On deliveries to private sidings, should consignees or consignors refuse to pay or unnecessarily

defer settlement of bills for car service, the agent will decline to switch cars to the private sidings of such parties, notifying them that deliveries will only be made to them on the public delivery tracks of the company, after the payment of freight charges at his office. Agent will promptly notify manager of action taken.'

'SECTION 1. The manager is authorized to entertain claims and refund car service charges in special cases. Claims should be made direct to the manager, with paid car service bills attached, and each claim should carry with it a full statement of the grounds upon which reduction of the car service is requested.'"

On December 8, 1906, the Supreme Court of the State of Kansas awarded a peremptory writ of mandamus, as prayed for by the Mill Company. (Rec., p. 12, and also p. 104.) On the 24th day of December, 1906, on due application and filing of petition and assignment of errors, a writ of error was granted by this Court to the Supreme Court of the State of Kansas, to review the judgment of said State Court entered on the 8th day of December, 1906, upon the condition that the Missouri Pacific should give to the said Mill Company a good and sufficient bond in the sum of \$20,000, conditioned that said defendant should prosecute its writ of error to effect, and, if it failed to make good its plea, should pay all damages and costs, such security and bond to be approved by one of the Justices of the Supreme Court of the State of Kansas. The said bond and undertaking was approved by the Chief Justice, and order made that the same should operate as a *supersedeas* (Rec., pp. 104-105); and the transcript of all the proceedings had in said Supreme Court of Kansas was duly and properly transferred to and filed in this Court, where said cause remained pending until the — day of January, 1909, when the judgment of said Supreme Court of Kansas was affirmed. (See *Mo. Pac. Ry. Co. v. Larabee Co.*, 211 U. S. 612-627.)

The mandate of this Court was duly transmitted to and filed with the Clerk of the Supreme Court of the State of Kansas, and the order of affirmance of the judgment of said Court duly entered. After the mandate of this Court was entered with the Clerk of the Supreme Court of Kansas, the Mill Company filed an "amended statement and claim by plaintiffs for damages" (Rec., pp. 106-108), among other items of which will be noticed, for services of attorneys in this Court, the following:

Waters & Waters, services in Supreme Court of United States.....	\$40,000.00
Amount paid for printed briefs in this Court.....	193.50
John F. Switzer, employed to assist Waters & Waters in Supreme Court of United States.....	5,000.00
Rossington & Smith, services in this Court.....	30,000.00

Again:

Expenses of Rossington and Waters, attending this Court, April, 1908.....	500.00
---	--------

Again:

Expenses of Charles Blood Smith and J. G. Waters, attending this Court in October, 1908.....	480.60
--	--------

In addition, a large claim was made for damages alleged to have accrued to the Mill Company *subsequent* to the rendition of the final judgment of the Supreme Court of the State of Kansas on the 8th day of December, 1906. This claim for damages and attorneys' fees is based upon Section 5641, General Statutes of Kansas 1901 (being Section 731, Chapter 182, Laws of Kansas 1909), which is as follows:

"If judgment be given for the plaintiff, he shall recover the damages which he *shall have* sustained, to be ascertained by the court or jury, or by the referees, as in a civil action, and costs; and a peremptory mandamus shall be granted to him without delay."

This claim and demand was referred to a Commissioner, to take the evidence and make findings of fact and conclusions of law, and subsequently, on the 15th day of June, 1911, his report, including his findings of fact and conclusions of law, was filed with the Clerk of the Supreme Court of the State of Kansas. (Rec., pp. 21-52) The Commissioner allowed, as damages to the Mill Company, \$20,014.10. (Rec., p. 42.) Among the items allowed were the following:

One item, damage accruing subsequent to December 8, 1906 (Rec., p. 23)	\$ 1,027.59
Another item, accruing same time (Rec., p. 23)	1,359.27
Another item, accruing same time (Rec., p. 24)	718.25
Another item, accruing same time (Rec., p. 28)	1,890.00
For services of Waters & Waters, Supreme Court of Kansas.	2,500.00
Total amount of allowance for attorneys' fees for services in Supreme Court United States subsequent to December 8, 1906	11,480.00

All of the foregoing items, except that of \$2,500.00, accrued *subsequent* to the issuance of the writ of error by this Court to the Supreme Court of the State of Kansas, and the execution and approval of the bond, as required by the Federal Statute, to operate as a *supersedeas*.

The report of the Commissioner was approved by the Supreme Court of the State of Kansas (Rec., pp. 268-276), and petition and application for rehearing was filed by the Missouri Pacific (Rec., pp. 279-298), which was overruled by the Supreme Court of the State of Kansas (Rec., p. 298), and a writ of error was allowed by this Court to the Supreme Court of the State of Kansas, and proper bond given, as a *supersedeas*.

ASSIGNMENT OF ERRORS.

FIRST.

"The Supreme Court of Kansas erred in holding and deciding, contrary to the contention and claim of the defendant, and contrary to law, that the Judiciary Act of Congress (Sections 999, 1000, 1003, 1010, Compiled Statutes United States 1901, Vol. 1) did not deprive the Supreme Court of Kansas of jurisdiction to assess damages against the defendant alleged to have accrued after the rendition of final judgment by it, and after such judgment had been superseded, as provided by said Judiciary Act, and was pending in the Supreme Court of the United States."

SECOND.

"The said Supreme Court of Kansas erred in holding that the allowance of the writ of error heretofore allowed herein did not operate to remove the suit from the Supreme Court of the state to the Supreme Court of the United States, but merely operated to bring up the record for review."

THIRD.

"The Supreme Court of Kansas erred in holding that the said Larabee Flour Mills Company might recover, in this proceeding, damages and expenses, including attorneys' fees, which accrued after the giving of the *supersedeas* bond, and during the time said proceedings were pending in the Supreme Court of the United States."

FOURTH.

"The Supreme Court of Kansas erred in holding and deciding that it had jurisdiction to render judgment against the Missouri Pacific Railway Company for expenses incurred and attorneys' fees in defending the proceedings in error in the Supreme Court of the United States."

FIFTH.

"The Supreme Court of the State of Kansas erred in refusing to hold that, if attorneys' fees for services in defending the action in the Supreme Court of the United States, and expenses incident thereto, are recoverable at all, the same should be determined by that court, or in a proceeding on the *supersedeas* bond, and not by the Supreme Court of Kansas."

SIXTH.

"The Supreme Court of Kansas erred in refusing to hold that Section 723, Chapter 182, Laws of Kansas 1909, as construed by the Supreme Court of Kansas in *McClure v. Scates*, 64 Kan. 284, deprived the defendant of its property without due process of law, and denied to it the equal protection of the law; and in refusing to hold and decide that said Section 723, Chapter 182, Laws of 1909, was unconstitutional and void, and in conflict with the Fourteenth Amendment, and that the allowance of attorneys' fees and expenses of litigation thereunder to the Larabee Flour Mills Company, against the defendant, denied to the defendant the equal protection of the law, and deprived it of its property without due process of law—in violation of the Constitution of the United States, and the Fourteenth Amendment thereto, and the laws enacted by Congress in pursuance thereof."

SEVENTH.

"The Supreme Court of Kansas, by its decision and judgment herein, denied to the defendant the equal protection of the law, and refused to give due force and effect to the Fourteenth Amendment to the Constitution of the United States, and the laws of Congress passed in pursuance thereof."

EIGHTH.

"The Supreme Court of Kansas erred in refusing to give full force and effect to the mandate of the Supreme Court of the United States, and has entered a different judgment against the defendant than it was authorized by said mandate to enter, and, in so doing, has disregarded the Constitution and laws of the United States."

NINTH.

"The said Supreme Court of Kansas erred in holding and deciding that the Act of Congress entitled, 'An Act to protect trade and commerce against unlawful restraint and monopolies,' did not preclude the Larabee Flour Mills Company from recovering herein, although a member of such unlawful combination."

TENTH.

"The said Supreme Court of Kansas was without any jurisdiction to render judgment against the defendant for any amount, and, in assuming to render such judgment, deprived the defendant of its property without due process of law, and denied to it the equal protection of the law."

ELEVENTH.

"The said Supreme Court of Kansas erred in rendering judgment against the defendant for any amount, and, in so doing, denied to the defendant the equal protection of the law as guaranteed by the Fourteenth Amendment to the Constitution of the United States."

TWELFTH.

"The Supreme Court of Kansas erred in overruling and denying the motion, petition and application of the said The Missouri Pacific Railway Company for a rehearing, for reasons in said motion contained."

THIRTEENTH.

"The Supreme Court erred in refusing to enter judgment in accordance with the mandate of the Supreme Court of the United States filed herein."

For the convenience of the Court, and in order that this controversy may be presented concisely and without repetition, we will condense the numerous "assignment of errors," *supra*, to a limited number of "specification of errors," upon which plaintiff in error relies for a reversal of the judgment of the court below, each of which is presented in different form in the "assignment of errors," *supra*. (Rec., pp. 302-304.)

SPECIFICATION OF ERRORS RELIED UPON BY PLAINTIFF IN ERROR.

FIRST.

The Supreme Court of Kansas erred in refusing to hold that Section 5193, General Statutes of Kansas 1901 (being Section 723, Chapter 182, Laws of Kansas 1909), as construed by that court in *McClure v. Scates*, 64 Kan. 284, was unconstitutional and void, and in conflict with the Fourteenth Amendment to the Constitution of the United States, and denied to the defendant the equal protection of the law, and deprived it of its property without due process of law; and in holding and deciding that the Mill Company, as an element of damage, was entitled to recover expenses of litigation, including attorneys' fees, in that court, and in the Supreme Court of the United States, which decision and judgment of said court was in violation of the Constitution of the United States and the laws of Congress enacted in pursuance thereof.

SECOND.

The Supreme Court of Kansas erred in holding and deciding, contrary to the contention and claim of the defendant, and contrary to law, that the Judiciary Act of Congress (Sections 999, 1000, 1003, 1010, Comp. Stat. U. S. 1901, Vol. 1) did not deprive the Supreme Court of Kansas of jurisdiction to assess damages against the defendant alleged to have accrued after the rendition of final judgment by it, and after such judgment had been superseded, as provided by said Judiciary Act, and was pending in the Supreme Court of the United States;

and in holding that the allowance of the writ of error heretofore allowed herein did not operate to remove the suit from the Supreme Court of the state to the Supreme Court of the United States; and in holding that the said Mill Company might recover in this proceeding damages and expenses, including attorneys' fees, which accrued *after* the giving of the *supersedeas* bond, and during the time said proceedings were pending in the Supreme Court of the United States; and in holding and deciding that it had jurisdiction to render judgment against the Missouri Pacific Railway Company for expenses incurred and attorneys' fees in defending the proceedings in error in the Supreme Court of the United States; and in refusing to hold that, if attorneys' fees for services in defending the action in the Supreme Court of the United States, and expenses incident thereto, are recoverable at all, the same should be determined by that court, or in a proceeding on the *supersedeas* bond, and not by the Supreme Court of Kansas in this proceeding; and, in allowing such claim, acted without jurisdiction, and deprived the Railway Company of its property without due process of law, and denied to it the equal protection of the law.

THIRD.

The Supreme Court of Kansas erred in refusing to enter judgment in accordance with the mandate of this Court, and in refusing to give full force and effect to such mandate, and in entering a different judgment against the plaintiff in error than it was authorized by said mandate to enter, and, in so doing, disregarded the Constitution and laws of the United States.

FOURTH.

The said Supreme Court of Kansas erred in holding and deciding that the Act of Congress entitled, "An Act to protect

trade and commerce against unlawful restraint and monopolies," did not preclude the Mill Company from recovering herein, although a member of such unlawful combination.

FIFTH.

The said Supreme Court of Kansas was without any jurisdiction to render judgment against this defendant for any amount, and, in assuming to render such judgment, deprived this defendant of its property without due process of law, and denied to it the equal protection of the law.

BRIEF AND ARGUMENT.

FIRST.

The Supreme Court of Kansas erred in refusing to hold that Section 5193, General Statutes of Kansas, 1901 (being Section 723, Chapter 182, Laws of Kansas, 1909), as construed by that court in *McClure v. Scates*, 64 Kan. 284, was unconstitutional and void, and in conflict with the Fourteenth Amendment to the Constitution of the United States, and denied to the defendant the equal protection of the law, and deprived it of its property without due process of law; and in holding and deciding that the Mill Company, as an element of damage, was entitled to recover expenses of litigation, including attorney's fees, in that court, and in the Supreme Court of the United States, which decision and judgment of said court was in violation of the Constitution of the United States and the laws of Congress enacted in pursuance thereof.

Section 5193, General Statutes of Kansas 1901 (being Section 723, Chapter 182, Laws of Kansas 1909), provides that:

"If judgment be given for the plaintiff, he shall recover the damages which he shall have sustained, to be ascertained by the court or jury, or by referees, as in a *civil action*, and costs; and a peremptory writ shall also be granted to him without delay."

In the case of *McClure v. Scates*, 64 Kan. 282-284, the Supreme Court of Kansas so construed the word "damages," as used in the foregoing statute, that the successful *plaintiff*

in such an action was "entitled to recover, as *damages*, the *necessary outlay* for attorneys, as well as for other loss and expenses resulting from the wrong of the defendant." The statute, as construed by the Supreme Court of Kansas, would read as follows:

"If judgment be given for the plaintiff, he shall recover the damages which *he shall have* sustained, which shall include his attorneys' fees, printing briefs, hotel bills of the plaintiff and his attorneys, railroad fare, and all 'incidental expenses,' to be ascertained by the court or jury, or by referees, as in a civil action, etc."

The Supreme Court of Kansas has judicially determined that this is the proper interpretation of the statute, and, by this interpretation, the statute must stand or fall.

C., etc., Ry. Co. v. Minnesota, 134 U. S. 456-7.

As thus construed, and as applied to the parties to this litigation, can there be any escape from the conclusion that it denied to the Missouri Pacific the equal protection of the law?

In the case of *Yick Wo v. Hopkins*, 118 U. S. 373, this Court made observations most pertinent here. The Court, in this case, is not obliged to reason from the probable to the actual, and pass upon the validity of this statute, "as tried merely by the opportunities which its terms afford of unequal and unjust discrimination" in its administration. This case presents the statute in actual operation, and the facts disclosed by the record establish an administration not only directed exclusively against a particular class, but against a particular party litigant, such "as to warrant and require the conclusion" that, whatever may have been the intent of the Legislature in enacting this statute, its application in this case was so "unequal and oppressive as to amount to a practical denial by the

state of that equal protection of the laws which is secured" to all persons "by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States."

As well said by this Court in *Yick Wo v. Hopkins*, *supra*:

"Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority, with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances material to their rights" it is a denial of equal justice which is "still within the protection of the Constitution."

Our contention here may be illustrated by reference to one item:

"Fourteenth. To cash paid and plaintiff's *agreement* to pay Waters & Waters attorneys' fees in this case, twenty-five hundred dollars (\$2,500.00)." (Rec., p. 101.)

This referred to service of this firm in the Supreme Court of the State of Kansas. Later, an "amended statement and claim by plaintiff for damages" was filed (Rec., pp. 106-107), in which said item appeared as follows, *viz.*:

"Ninth. For the *reasonable* value of the services of Waters & Waters, to bring this action, and to attend the same in the Supreme Court of the State of Kansas, the sum of \$2,500."

This item of \$2,500 for legal services of Waters & Waters in the Supreme Court of Kansas was supported only by the testimony of J. G. Waters (Rec., pp. 139-140), in which he states, relative to the services by him performed in the institution of this suit in the Supreme Court of the State of Kansas, and in connection therewith:

"It didn't require any previous study to prepare application for mandamus. It took me probably half an hour to prepare it. At that time I understood the controversy involved \$79, as demurrage charges, and did not require much investigation. I advised Mr. Larabee not to pay the \$79, and he acted upon my advice. That was the beginning of the controversy. I had two or three conversations with you [B. P. Waggener] over the 'phone, which probably consumed five minutes at a time. I prepared briefs on demurrer to plea in abatement, which took a very short time. I can't say whether I was at work one day or ten days in the preparation of the brief on demurrer to plea in abatement. The argument in the Supreme Court of Kansas took twenty minutes, and the court summarily disposed of it. I next applied and had a Commissioner appointed. I spent two or three days at Stafford. I charged \$75 for a trip down there to prepare the case, and think that was a reasonable charge. I was engaged approximately three days in the taking of evidence before the Commissioner—maybe more. I think one hundred dollars would be an ordinary fee for that three days. I have no book account of the charge against the Larabee Company for my services. I never keep any books. I spent a day or so in Topeka taking evidence before the Commissioner.

* * * * *

The argument before the Supreme Court probably did not take more than thirty minutes. No one else appeared there with me."

"Q. What, in your opinion, would you ordinarily charge for the preparation of the case and argument in the Supreme Court? A. I have an idea that if I would cover the ground, the brief you furnished, and to make a twenty-minute talk in the Supreme Court, if I got fifty or a hundred dollars for it I would be making a fair charge."

We say that this is the sole testimony in support of this item, because the Commissioner, in his report, expressly excluded, as incompetent, all of the testimony of the experts who gave their opinion as to the value of the services of these law-

yers. And the report of the Commissioner was approved in full by the Supreme Court of the state.

And thereon it proceeded to allow the item of \$2,500, although J. G. Waters had fixed the maximum value of such services, *in toto*, at not exceeding \$250. And the Commissioner supplements his action by finding that (Rec., p. 33):

"I find that no agreement has ever been had between the Mill Company and any of the attorneys as to the amount of their compensation; that neither of the attorneys has at any time entered on his books a charge against the Mill Company for services rendered; nor have they informed the Mill Company of the amount intended to be charged; nor have they determined in their own minds any definite amount intended to be charged.

I find that the attorneys will claim the full amount, and will accept whatever amount that shall be determined by this court in this proceeding to be a reasonable compensation for their services in the case, and allowed as part of the damages.

I further find that it is mutually understood between the Mill Company and the attorneys named, that whatever amount is recovered in this proceeding on account of fees and expenses of counsel will be paid by the Mill Company to and accepted by the attorneys as a full discharge of the liability to them."

And this finding and report of the Commissioner was approved by the Supreme Court of the state, and the only consideration they gave to this item of \$2,500, in stating that the same had been allowed by the Commissioner, was to say (Rec., p. 272):

"It is sufficient to say we approve the finding and the allowance of the claim."

In other words, the Commissioner and the Supreme Court of Kansas force into the pockets of Waters & Waters \$2,500

which the Mill Company had not paid, and had assumed no obligation to pay, and for services which J. G. Waters testified were reasonably worth not to exceed \$250—and this is denominated fair and impartial justice.

Again, this Court is familiar with the case which was presented here—211 U. S. 612.

In the amended statement and claim for damages are found the following items (Rec., p. 106) :

6th.	For amount paid Vandiveer & Martin, for legal services.....	\$ 25.00
7th.	For services of C. G. Webb, attorney.....	500.00
8th.	Paid to J. G. Waters, independently of hiring him in this action, for coming to Stafford for counsel and advice.....	75.00
9th.	For the reasonable value of services of Waters & Waters, to bring this action, and to attend to same in Supreme Court of Kansas.	2,500.00
10th.	For the reasonable value of services of Waters & Waters, in this case, in Supreme Court United States.....	40,000.00
11th.	For cash paid out for printed briefs in State and United States Supreme Courts.....	193.50
12th.	For reasonable value of professional services of John F. Switzer, attorney, to assist Waters & Waters in Supreme Court United States.	5,000.00
13th.	For the reasonable value of professional services of Rossington & Smith.....	30,000.00
14th.	For railroad fare, hotel bills, and reasonable expenses of W. H. Rossington and J. G. Waters, in attending on Supreme Court United States in April, 1908, sum of \$250 each, making total of.....	500.00
15th.	For railroad fare, hotel bills and reasonable expenses of Charles Blood Smith and J. G. Waters, in attending on Supreme Court in October, 1908.	480.60
		<hr/>
		\$79,274.10

Making a total of attorneys' fees and expenses of upwards of \$79,274.10 for a controversy which, in its inception, involved \$79.00.

In the hearing before the Commissioner (Rec., pp. 219-224) it appears that J. G. Waters employed J. D. Houston to represent Waters, Switzer and Smith in the claim for damages against the Railway Company. No charge was ever made on the books of Waters & Waters for any of these extraordinary items, and the record shows that Rossington & Smith made no charge on their books except for \$500 and their expenses, and never presented any bill to the Mill Company for services outside of the \$500 which they had been paid. And yet, in the face of this most extraordinary record, the following claims are allowed to the Mill Company (Rec., p. 42):

On its first claim.....	\$ 2,386.85
On the second and third claims.....	1,381.25
On the fourth claim.....	1,890.00
On the ninth claim.....	2,500.00
On the tenth, twelfth, thirteenth, fourteenth and fifteenth claims.....	11,480.00
On the seventeenth claim.....	186.00
On the eighteenth claim.....	160.00
On the twenty-first claim.....	30.00
	<hr/>
	\$20,014.10

And this allowance is approved and confirmed by the Supreme Court of Kansas. (Rec., pp. 268-276.) An examination of the opinion of the court below in confirming the report of the Commissioner will disclose the fact that it is confirmed upon the theory that the court is bound by the findings of fact and conclusions of the Commissioner. Nevertheless, the attention of this Court is called to the fact that, in the case of *State v. Ry. Co.*, 76 Kan. 501, the defendant company invoked the rule that the court was bound by the report of the Referee,

but the learned Justice who wrote the opinion in that case (and also in this case), denying the contention of the Railway Company, said that:

"This is an original proceeding in mandamus. We are not bound by the Referee's conclusions, either of fact or of law, as would be the case were the facts found by another court or a jury or referee of another court."

The foregoing will serve to illustrate our contention that, whatever may have been the intention of the Legislature in enacting this statute, its application in this case was so "unequal and oppressive as to amount to a practical denial by the state of that equal protection of the laws which is secured" to all persons "by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States."

As fully disclosed by the findings of fact made by the Commissioner in the original application (Rec., pp. 2-8, Finding 16th), the real amount in controversy was \$79.00, demurrage charges, and nine lawyers have appeared in the case, as *necessary* to properly protect the interests of the Mill Company. The court below allowed the Mill Company, as damages for the "wrong" of the Railway Company, the sum of \$20,014.10, of which sum \$14,940.00 goes to the Mill Company's lawyers, and \$5,074.10 to the Mill Company—and 90 per cent of *all* which accrued *after* the 8th day of December, 1906—the date when the Supreme Court of Kansas entered its final judgment awarding its peremptory writ of mandamus.

It must not be overlooked that the \$14,940.00 allowed as damages on account of attorneys' fees does not go to the Mill Company to reimburse it for amount by it paid to its attorneys, or to discharge any legal or moral obligation to them, for that question is settled by the finding of the Commissioner, *viz.* (Rec., p. 33):

"I find that the attorneys will claim the full amount, and will accept whatever amount that shall be determined by this Court in this proceeding to be a reasonable compensation for their services in the case, and allowed as part of the damages.

I further find that it is mutually understood between the Mill Company and the attorneys named that whatever amount is recovered in this proceeding on account of fees and expenses of counsel will be paid by the Mill Company to and accepted by the attorneys as a full discharge of the liability to them."

But this agreement was ignored by the court below, and the Statute of Kansas (Sec. 5193, Genl. Stat. 1901) so construed that the hearing before the Commissioner (Rec., p. 22) was not an attempt to prove any *damage* sustained by the Mill Company, but to induce the Commissioner to allow Waters & Waters a fee of \$40,000.00 and Rossington & Smith a fee of \$30,000.00 for their services in this Court, and John F. Switzer (who had never been admitted to practice in this Court) a fee of \$5,000.00 for assisting Waters & Waters in this Court. As thus construed by the State Court, was not the administration of the statute not only a glaring and indefensible perversion of justice, but a plain denial of the equal protection of the law?

Again, the action brought by the Mill Company was not for the enforcement of a public duty enjoined upon the Railway Company by any statutory law. The Commissioner finds:

"That the action for a mandamus was not based upon nor any right sought to be enforced, predicated upon any duty of the Pacific Company imposed by a statute of Kansas, or any provision of the Interstate Commerce Act.

That the duty sought to be enforced by mandamus was not a duty imposed, or sought to be imposed, upon the Pacific Company by this Court by its judgment.

That the duty sought to be enforced by the judgment of this Court was a self-imposed duty by the voluntary

undertaking of the Pacific Company itself, of furnishing the same and equal facilities to the Mill Company which it at the same time furnished to other persons at the same place similarly situated and conditioned, the common-law duty of a common carrier.

That this self-imposed duty was not modified or restricted by any provision of the Interstate Commerce Act. On the contrary, it was and is provided in Section 3 of that Act as follows:

'That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Every common carrier subject to the provisions of this Act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for their interchange of traffic between their respective lines, and for the receiving, forwarding and delivering of passengers and property to and from their lines and those connecting therewith.'

That the jurisdiction of this court to enforce the performance of the duty required by the alternative writ was not affected by the fact that the switching service required comprehended the movement of property the greater part of which was intended by the Mill Company to become, or as a matter of fact would from the initial movement from the Mill become, subjects of interstate commerce.

That the enforcement of the performance of that duty as to articles of property subjects of interstate commerce was not, by express words or by implication, committed to the jurisdiction of the Federal Courts.

That the enforcement of the performance of that duty by a State Court is not incompatible with the full and free operation of every provision of the Interstate Commerce Act, nor incompatible with the discharge of every duty devolving upon, or exercise of every power and authority vested in the Interstate Commerce Commission by that Act.

That the State Courts can exercise concurrent jurisdiction with the Federal Courts in cases arising under the Constitution, laws or treaties of the United States has been determined by repeated decisions of the Supreme Court of the United States."

The action of the Mill Company was for the purpose of enforcing a private right—a "self-imposed duty by the voluntary undertaking of the Pacific Company itself." The action was in no sense one to enforce the police power of the state, or a police regulation of any kind, as in cases like

R. R. Co. v. Mathews, 58 Kan. 447; aff. 174 U. S. 96.
Assur. Co. v. Bradford, 60 Kan. 82.
Fid. Mut. Assn. v. Mettler, 185 U. S. 308.

Whenever attorneys' fees have been sustained by the Supreme Court of Kansas, the same have been allowed as a penalty.

R. R. Co. v. Mower, 16 Kan. 573.

In the case of *Winstead v. Hulme*, 32 Kan. 573-4, it was said that:

"In an action of this kind, unless the elements of malice, gross negligence or oppression mingle in the controversy, the law does not allow the jury to find what are termed exemplary or vindictive damages. As evidence was before the jury tending to prove the attorneys' fees of plaintiff below, the amount claimed by him for compensation for attending the action and the damages to his credit, the jury may have supposed, under the direction given, that these sums were actual damages which the plaintiff below was entitled to recover. A sheriff, in seizing goods under a writ of execution, is responsible in damages if he takes the goods of the wrong person; and if acting under color of process he is guilty of fraud, malice, gross negligence or oppression in the execution of the

process, he may be held liable in exemplary damages. (*Wiley v. Keokuk*, 6 Kan. 94; *Nightingale v. Scannell*, 18 Cal. 315; *Cable v. Dakin*, 20 Wend. 172.) But where a sheriff wrongfully seizes property upon an execution in his hands, and there is no malice, gross negligence, oppression or improper motive on his part in the seizure, he is not liable in exemplary or vindictive damages. (*Wiley v. Keokuk*, *supra*; *Phelps v. Owens*, 12 Cal. 22; *Dorsey v. Manlove*, 14 *id.* 553; *Nightingale v. Scannell*, *supra*; *Bell v. Campbell*, 17 Kan. 212, and cases cited.) Therefore, if in this case exemplary damages were allowable on account of the conduct of the officer, the court should have expressly directed the jury not to allow such damages, unless the sheriff was guilty of fraud, malice, or wilful wrong. If exemplary damages were not allowable, the jury should not have considered, in assessing damages, the evidence concerning the attorneys' fees, the compensation for attending the action, or the alleged damage to the credit of plaintiff below. Attorneys' fees are not recoverable in an action of this kind where no malice or wilful wrong is proved."

In the case of *Doom v. Curran*, 52 Kan. 360, it was said:

"The expenses of the vendee for railway fare and hotel bills while attempting to make a settlement with the vendors cannot be properly included in the damages allowed against the vendors."

In the case of *Atkinson v. Woodmanse*, 68 Kan. 71, the court had under consideration Section 5125, General Statutes of Kansas 1901, which provides as follows:

"In any action brought by any artisan or day laborer to enforce any lien under this Act, where judgment be rendered for plaintiff, the plaintiff shall be entitled to recover a reasonable attorney's fee, to be fixed by the court, which shall be taxed as costs in the action."

The court, in holding that this law was unconstitutional and void, in this, that it denied to persons within the jurisdiction of the state the equal protection of the law, said:

"The Constitution of the United States is the supreme law of the land, and the judges in every state are bound thereby, anything in the Constitution or laws of their own state to the contrary notwithstanding. (U. S. Const., Art. VI.) Section 1 of Article XIV of the amendments to that Constitution provides that no state shall deny to any person within its jurisdiction the equal protection of the laws. The statute in question singles out property owners who are charged with receiving from artisans or day laborers labor going to the improvement of their property, by virtue of a contract made by themselves, or through contractors employed by them, and mulcts them in damages if they should be unsuccessful in resisting a claimed lien therefor. Under the statute, such persons are subjected to a liability for attorneys' fees when owners of other classes of property and when other classes of persons employing artisans and day laborers are not subjected to such burden, and their contracts for labor are segregated from all other contracts, and separately classified as if they possessed some distinctive attribute calling for the imposition of special legislative penalties for their enforcement.

Of course the Legislature may classify objects of legislation, and it has a wide discretion in that respect, but classifications may not be made either arbitrarily or capriciously. There must be differences in the elements and relations distinguished producing consequences justifying difference in treatment, and these differences must be such as by the very nature of the things considered to divide them into classes. Thus, a statute allowing the recovery of attorneys' fees in an action against a railroad company for damages caused by its negligence in permitting the escape of fire is in the nature of a police regulation to prevent carelessness in the use of a dangerous element, and the consequent destruction of property. (*Railroad Co. v. Matthews*, 58 Kan. 447, 49 Pac. 602, aff. 174 U. S. 96, 19 Sup. Ct. 609, 43 L. Ed. 909.) The business of fire insurance has likewise assumed such a peculiar and special relation to the public welfare that the Legislature is authorized to provide special penalties for breaches of contracts made in its prosecution. (*Assurance Co. v. Bradford*, 60 Kan. 82, 55 Pac. 335; *Fid. Mut. Life Assn. v. Mettler*, 185 U. S. 308, 22 Sup. Ct. 662, 46 L. Ed. 922.)"

In this case (68 Kan. 74-75) the Supreme Court of Kansas, in holding that Section 5125, Genl. Stat. 1901, allowing attorneys' fees to the successful plaintiff was unconstitutional and void, refer to and specially approve the decision of this Court in *Gulf, Col. & Santa Fe v. Ellis*, 165 U. S. 153. Under this statute (Section 5193, Genl. Stat. 1901), as construed by the State Court, the parties litigant cannot appeal to the courts as other litigants under like conditions and with like protection.

"If litigation terminates adversely to them, they are mulcted in the attorneys' fees of the successful plaintiff; if it terminates in their favor, they recover no attorneys' fees. It is no sufficient answer to say that they are punished only when adjudged to be in the wrong. They do not enter the courts upon equal terms. They must pay attorneys' fees if wrong; they do not recover any if right; while their adversaries recover if right, and pay nothing if wrong. In the suits, therefore, to which they are parties they are discriminated against, and are not treated as others. They do not stand equal before the law. They do not receive its equal protection. All this is obvious from a mere inspection of the statute."

In the *Ellis* case, *supra*, this Court refers to the decision of the Supreme Court of Alabama in the case of *South & North R. R. Co. v. Morris*, 64 Ala. 193-199, in which it was stated that (165 U. S. 160):

"Justice cannot be sold or denied by the exaction of a pecuniary consideration for its enjoyment from one, when it is given freely and openhanded to another, without money and without price. Nor can it be permitted that litigants shall be debarred from the free exercise of this constitutional right by the imposition of arbitrary, unjust and odious discriminations, perpetrated under color of establishing peculiar rules for a particular occupation. Unequal, partial and discriminatory legislation, which secures this right to some favored class or classes, and denies it to others, who are thus excluded from that equal pro-

tection designed to be secured by the general law of the land, is in clear and manifest opposition to the letter and spirit of the foregoing constitutional provisions."

In the case of *Wilder v. R. R. Co.*, 70 Mich. 384, referred to by this Court in *R. R. Co. v. Ellis*, 165 U. S. 162, in discussing a statute which allowed to the successful plaintiff an attorneys' fee, it was said that:

"Calling it an 'attorneys' fee' does not change its real nature or effect. It is a punishment to the company, and a reward to the plaintiff, and an incentive to litigation on his part. This inequality and injustice cannot be sustained upon any principle known to the law. It is repugnant to our form of government, and out of harmony with the genius of our free institutions. The Legislature cannot give to one party in litigation such privileges as will arm him with special and important pecuniary advantages over his antagonist."

The case at bar most forcibly illustrates the injustice of such a law. Not only is the Railway Company adjudged to pay \$2,500 to the Mill Company's attorneys, for alleged services in the State Court, but over eleven thousand dollars to the Mill Company's attorneys for alleged services in this Court, as a *penalty* and *punishment* for exercising a *right* given and guaranteed to it by the Constitution of the United States, and the judiciary act of Congress under which it sought, by writ of error, to review in this Court what it believed to be an erroneous judgment of the state court.

Lafferty v. R. R. Co., 71 Mich. 35.

Ry. Co. v. Williams, 49 Ark. 492.

Jolliffe v. Brown, 14 Wash. 155.

Ry. Co. v. Runnels, 77 Mich. 104.

Ry. Co. v. Baty, 6 Neb. 37.

Millett v. People, 117 Ill. 294.

Froer v. People, 141 Ill. 171.

Durkee v. Janesville, 28 Wisc. 464.
Janesville v. Carpenter, 77 Wisc. 288.

In the case of *Oelrichs v. Spain*, 15 Wall. 230-231, speaking of attorney's fees, the court said that:

"The plaintiff is no more entitled to them if he succeeds than is the defendant if the plaintiff is defeated. Why should a distinction be made between them?"

And how very pertinent to this case are the reasons assigned in that case for the disallowance of counsel fees. The court said:

"In debt, covenant and assumpsit damages are recovered, but counsel fees are never included. So in equity cases, where there is no injunction bond, only the taxable costs are allowed to the complainants. The same rule is applied to the defendant, however unjust the litigation on the other side, and however large the *expensalitis* to which he may have been subjected. The parties in this respect are upon a footing of equality. There is no fixed standard by which the honorarium can be measured. Some counsel demand much more than others. Some clients are willing to pay more than others. More counsel may be employed than are necessary. When both client and counsel know that the fees are to be paid by the other party, there is danger of abuse. A reference to a master, or an issue to a jury, might be necessary to ascertain the proper amount, and this grafted litigation might possibly be more animated and protracted than that in the original cause. It would be an office of some delicacy on the part of the court to scale down the charges, as might sometime be necessary.

We think that the principle of disallowance rests on a solid foundation, and that the opposite rule is forbidden by the analogies of the law and sound public policy."

The court refers to and approves:

Arcambel v. Wiseman, 3 Dal. (U. S.) 306.
Day v. Woodworth, 13 How. (U. S.) 370-372.
Tess v. Huntington, 23 How. (U. S.) 2.
The Baltimore, 8 Wal. 378.

The question was again before the Supreme Court of the United States in the case of *Tullock v. Mulvane*, 184 U. S. 510-512, and all of the decisions cited *supra* referred to and approved.

It is not claimed that there was any fraud or malice in this case on the part of the Railway Company entitling the Mill Company to exemplary or vindictive damage. What reason can be assigned for giving to the plaintiff in a *mandamus* case a privilege which will arm him with special and important advantages over the defendant? The defendant "must pay attorneys' fees, if wrong; they do not recover any if right"; while the plaintiff "recovers if right, and pays nothing if wrong."

"In the suit, therefore, to which they are parties, they are discriminated against and are not treated as others. They do not receive its equal protection."

This proceeding being to enforce a *private* right, in which the public is in no manner interested, why should the Mill Company be given such an advantage over the defendant? In this case every conceivable item of expense of the plaintiff has been allowed, including railroad fare of self and attorneys, hotel bills, printing briefs, attorneys' fees, which the plaintiffs have not paid, and are not legally responsible for, and including the *per diem* attendance of the plaintiff before the Commissioner, at the rate of ten dollars per day, aggregating \$376. (Rec., p. 40.) Can it be that, under the Fourteenth Amend-

ment to the Constitution of the United States, justice is "to be sold or denied by the exaction of a pecuniary consideration for its enjoyment from one, when it is given freely and open-handed to another, without money and without price?" Such discrimination is repudiated by many, if not all, the states of the Union.

In the case of *Howell v. Scroggins*, 48 Cal. 355, it was held:

"In an action for an assault and battery, the jury, in estimating the damages, cannot take into consideration the plaintiff's expenses in the prosecution of the suit."

In the case of *Falk v. Waterman*, 49 Cal. 224, it was said:

"In an action for a trespass committed by breaking into the plaintiff's rooms and destroying property, the jury, in estimating damages, must not take into consideration plaintiff's counsel fees and other expenses growing out of the litigation."

In the case of *Jacobson v. Poindexter*, 42 Ark. 97, it was said that:

"The law makes no allowance to the successful suitor for his time, indirect loss, annoyance or counsel fees. It considers in general the taxed cost as the only damages which a party sustains by the defense of a suit."

Goodbar v. Lindsay, 51 Ark. 382.

Clarke v. Wolfe, 115 Ga. 320.

In the case of *Bull v. Keenan*, 100 Iowa 144, it was said:

"In a suit to set aside a judgment by confession, expenses incurred by the plaintiff in the litigation, as attorneys' fees, hotel expenses and loss of time, cannot be recovered as damages."

In the case of *Dorris v. Miller*, 105 Iowa 568, it was said that:

"We will consider first the plaintiff's appeal. He argues that he should be allowed the amount paid out by him as attorneys' fees and costs in securing the removal of the defendant. The general rule is that attorneys' fees cannot be recovered from the adverse party, and the only question here is, do the facts of this case bring it within any of the exceptions to this general rule? Counsel for appellant make this citation from Sedgwick, Damages (5th Ed.), pp. 104-105:

'Where the act complained of is tainted by fraud, malice or insult, the jury which has the power to punish has necessarily the right to include the consideration of the probable counsel fees in their estimate of vindictive or exemplary damages.'

Attorneys' fees are not allowed under this rule as compensation, but rather as punishment for defendant's wrongful and malicious act. In other words, they may be considered in awarding exemplary damages. In the case at bar, the plaintiff does not plead malice, nor did he prove such a state of facts as entitles him to recover such damages. There are, it is true, a few cases in which counsel fees are or may be allowed, as in actions on contracts of indemnity, suits for malicious prosecution in some states, actions upon attachment bonds, etc., but this case does not fall within any of these exceptions. (*Irlbeck v. Bierl*, 101 Iowa 240; *Newell v. Danford*, 13 Iowa 463.) The defendant had the right to petition the probate court for appointment as ancillary administrator. Having this right, his motive would not make his conduct actionable. (*Jayne v. Drorbaugh*, 63 Iowa 711.) But if it be conceded that he had no such right, and that his conduct was tortious, yet plaintiff is not entitled to recover attorneys' fees paid by him." (*Planders v. Tweed*, 15 Wall. 450; *Oelrichs v. Spain*, 15 Wall. 211; *Barnard v. Poor*, 21 Pick. 378.)

The case of *Boardman v. Grocery Co.*, 105 Iowa 451, was a mandamus action in which the petitioner claimed attorney's fees, and for time lost and expenses, and the court said:

"As to actual damages, the rule seems to be that it is only in exceptional cases allowance is made a litigant for time or expenses incurred in prosecuting or defending an action. Liability for the taxable costs is ordinarily considered sufficient punishment for unfounded claim or meretricious defense. The items which appellant claims should be allowed him were incurred in the prosecution of his action, and in an attempt to secure to himself the advantage of a statutory right. The denial of this right did not in itself cause damage; at least none is shown. The expense was incurred in an attempt to secure a right, and we know of no rule which will authorize the allowance of such items as damage in a case brought to secure it. If it be true that they are recoverable, then there is good reason for holding that attorneys' fees, value of time lost, expenses in attending court, and kindred matters, may be recovered or taxed in any civil action. If anything is well settled it is that such items can neither be recovered nor taxed. No actual damages resulting from the denial of appellant's damages can be assessed, no matter how malicious the defendant's conduct. We are convinced, however, that there was no malice, and this should end the inquiry."

In the case of *Eatman v. R. R. Co.*, 35 La. Ann. 1018, it was held:

"Attorneys' fees are not recoverable in an action for damages when the act complained of is not tainted by fraud or malice."

In the case of *Barnard v. Poor*, 21 Pick. (Mass.) 382, it was said that:

"It is now well settled that even in an action of trespass, or other action sounding in damage, the counsel fees and other expenses of prosecution of the suit, not included in the taxed costs, cannot be taken into consideration in assessing damages."

In the case of *Henry v. Davis*, 123 Mass. 346, it was said:

"The theory of the law is that the taxable costs awarded to the prevailing party in a suit furnish full indemnity to him for all his expenses incurred in the suit."

In the case of *Gates v. Toledo*, 57 Oh. St. 105, the court held that "counsel fees and other expenses paid by a party" were not recoverable.

In the case of *Haverstick v. Gas Co.*, 29 Pa. St. 254, the court held that the "plaintiff cannot recover in damages the expenses of prosecuting a suit on a contract," and could not "recover damages for having to employ counsel to bring the suit."

In the case of *Earl v. Tupper*, 45 Vt. 287, it was held:

"The great weight of authority seems to be opposed to the allowance of counsel fees and other expenses of litigation, beyond taxable costs, as an element of damages, even in cases proper for exemplary damages."

In the case of *Burrus v. Hines*, 94 Va. 414, it was held:

"As a general rule, fees paid to counsel cannot be recovered as damages. If the injury complained of was not wanton or malicious, and exemplary damages are not recoverable, no greater counsel fee can be recovered against the defendant than that prescribed by law to be taxed in favor of the winning party."

In that case it was further said:

"Where parties in good faith differ as to their rights, and resort to law to settle their differences, the law has prescribed what costs shall be taxed, and what shall be therein included as the fee of the winning party. In

such case no greater fee should be allowed to be proved or recovered. The litigants should be placed on an equality. If the defendant is successful, it is very clear that he cannot recover from the plaintiff, in addition to the taxable costs, the fee paid by him to his attorneys, nor should the plaintiff, if successful, recover from the defendant the fee he may have paid or incurred to his attorneys."

In the case of *Fairbanks v. Watters*, 18 Wisc. 302, the court said that:

"In assessing damages, actual or punitive, the jury cannot take into account the value of services of counsel, or other expenses incident to the prosecution of the action, and evidence as to the value of such service or amount of such expenses is inadmissible."

In addition, the court said:

"The counsel for the respondent has not referred us to any case which decides that counsel fees, or proper compensation to a lawyer for prosecuting the action, aside from the taxed costs, might be taken into consideration by the jury in assessing damages. On the contrary, the following authorities expressly hold that no claim of that kind is admissible, and that if such items of expense are included by the jury in their verdict it is irregular and erroneous: *Day v. Woodward et al.*, 13 How. (U. S.) 363; *Barnard v. Poor*, 21 Pick. 378; *Hicks v. Foster*, 13 Barb. 663; *Lincoln v. Schenectady & Saratoga R. R. Co.*, 23 Wend. 425.

In *Day v. Woodward*, Justice Grier remarks that the doctrine about the right of the jury to include in their verdict in certain cases a sum sufficient to indemnify the plaintiff for counsel fees and other real or supposed expenses over and above taxed costs, seems to have been borrowed from the civil law and the practice of courts of admiralty. He goes on to remark, after giving the origin of costs *de incrementis* or taxed costs which the successful party was permitted to recover by way of amends for

his expense and trouble in prosecuting the action, that the jury neither at common law nor by statute could allow counsel fees and expenses as a part of the actual damages (p. 372). The opinions of the court in the other cases are equally emphatic and fully vindicate the soundness of the doctrine that the jury have no right to include in their verdict counsel fees and other expenses of litigation. Nor does it make any difference or change the rule that the action is one where punitive damages may be given. For if the expense of litigation, counsel fees, etc., may be assessed by the jury, it is very clear that it must be upon the principle that they are consequential damages, and relate to the amount of compensation rather than refer to damages which may be inflicted by way of penalty or punishment for aggravated misconduct. The question put was, what, in the judgment of the witness, was a fair compensation to a lawyer for prosecuting the action? This shows most conclusively that the party rested his claim for counsel fees upon the ground of compensation, recompense or satisfaction for expenses incurred, and not upon the ground that the action was one in which vindictive and exemplary damages might be given."

In the case of *Washburn v. Burke*, 84 Ill. App. 589, it was said that:

"An action at law is based upon the state of facts existing when the suit is begun, and claims not then due cannot be properly included in the judgment. When this suit was begun no attorneys' fees in it had been earned and there could be no recovery for such as might be subsequently earned."

In the case of *Knefel v. Ahem*, 57 Ill. App. 569, it was said that:

"Even when an injunction has been issued, the rule is uniform that for counsel fees nothing can be allowed except such as pertained strictly to the injunction; none for the general defense of the suit. And there is no

precedent for allowing damages to a complainant on the ground that enforcing his rights causes him expense."

In the case of *Maisenbacker v. Society*, 71 Conn. 378, it was said that:

"The expenses of litigation are not an element of the damages termed in law actual or compensatory damages; 'they are not the natural and proximate consequences of the wrongful act,' and they can only be considered by the jury in those cases in which exemplary damages may be awarded."

In the case of *Mason v. Hawes*, 52 Conn. 12, it was said:

"A jury may not consider plaintiff's expenses beyond his taxable cost in awarding damages, unless the case be one that involves positive culpability on the part of the defendant, and makes it a proper one for exemplary damages."

In the case of *Kelley v. Rogers*, 21 Minn. 147, it was held that:

"The fees of attorneys, and other expenses incurred by the plaintiff in the prosecution of the action, cannot properly be considered by the jury in estimating the damages to be awarded, even in cases proper for the infliction of exemplary damages."

In the case of *Spencer v. Murphy*, 6 Colo. App. 453, it was said that:

"Attorneys' fees as damages cannot be allowed in the absence of a statute or contract to that effect."

In *McKenzie v. Mitchell*, 123 Ga. 72, it was held that:

"Expenses of litigation are not recoverable by the plaintiff in an action for damages for the mere breach of

a contract, when it does not appear that such contract was entered into by the defendant in bad faith, or procured by him by fraud or deceit."

In the case of *R. R. Co. v. R. R. Co.*, 77 Ark. 137, it was said:

"Attorneys' fees are not ordinarily held to be an element of damage which may be recovered for breach of contract. (42 Ark. 97, 29 Pa. St. 254, 123 Mass. 345.) Nor could the parties have had in mind the repayment of attorneys' fees in a suit by the lessor against the lessee for the recovery of possession of the property at the end of the lease, or upon default of payment of rent. This would be a penalty upon the rights of the lessee to litigate." (62 Ark. 225.)

In the case of *Winkler v. Roeder*, 23 Neb. 706, it is held that attorneys' fees are not recoverable as part of compensatory damages.

In the case of *Doom v. Urran*, 52 Kan. 361, it is held that hotel bills and railroad fare should be excluded.

In the case of *Mattlage v. R. R. Co.*, 17 N. Y. Supp. 537, it was held that:

"We know of no rule of law by which a party can recover from his opponent the counsel fees paid, on the argument of an appeal by way of damages over and above those allowed as costs, except by virtue of an express contract, as when a bond or undertaking has been given or procuring an injunction, attachment, etc. In any other case, if the party chooses to pay more than the amount allowed by law as costs, he must do so at his own expense."

In the case of *Bishop v. Hendrick*, 31 N. Y. Supp. 502, it was held that:

"In an action by an administrator to recover personal property of his decedent, he cannot recover as damages fees paid by him to counsel for services rendered in the litigation against the defendant."

In the case of *Clason v. Nassau Ferry Co.*, 45 N. Y. Supp. 675, it was said that:

"The liability of a corporation to pay 'all damages resulting' to a person from the refusal of the corporation to allow an inspection of its stock book (Laws 1892, Ch. 688, Sec. 29) does not include costs and counsel fees of a mandamus proceeding by such person to compel the inspection of the stock book."

In the last cited case the court referred to the case of *Bishop v. Hendrick*, 31 N. Y. Supp. 502, and said:

"In the case last cited, damages were claimed under the statute which allows a recovery against an executor *de son tort* of all damages caused by his act to the estate of the deceased. (2 Rev. St., p. 449, Sec. 17.) It was sought to recover the legal expenses of certain actions and proceedings against the defendant for wrongfully withholding property, resisting proceedings for contempt and actions of interpleader, but it was held that they could not be recovered, the court saying:

"The law provides indemnity in the way of costs to be taxed in an action, and, in a proper case, to an additional allowance, to be recovered by the successful party in the regular proceeding in the action; and while, under the order of reference to which we have referred, and under which the referee acted in this case, any damage which, within the ordinary and well-settled rules of damage, the plaintiff suffered by reason of the conversion of any of this property, and which, in an action of trover or replevin, might be recovered, was legally allowable under this order in this action. But I know of no rule

of law that would include extra counsel fees for legal services beyond taxable costs and extra allowance given by the Code of Civil Procedure in an action of this character.'

The court goes on to distinguish actions upon injunction, and attachment bonds, and continues:

'In all these cases, and cases of a kindred character, the damages were awarded upon the express agreement and undertaking on the part of the defendant to pay the same, and both parties acted under and had a right to rely upon the performance of that agreement by the obligers. In the case at bar, while it is apparent that the conduct of the defendant tended greatly to enhance the expense of the plaintiff, there was no undertaking or agreement on the part of the defendant to indemnify the plaintiff further than the plaintiff may ordinarily be indemnified in the successful prosecution of an action, or a series of actions, by the costs and allowance awarded to a successful party in the usual method of practice in actions.' Case affirmed in the Court of Appeals, on the opinion below." (146 N. Y. 298, 42 N. E. 542.)

It will be noticed that this decision was affirmed by the Court of Appeals. (146 N. Y. 398.)

Unless based upon the enforcement of some police regulation, or a controversy involving malice, fraud or undue oppression, the plaintiff, in every other action brought under Kansas statutes, except that of mandamus, like the one at bar, cannot recover attorneys' fees, railroad fare, hotel bills, etc., as was authorized in this action.

Thus it will be seen that the state courts uniformly hold that it is not the equal protection of the law for a statute to arbitrarily allow an attorney's fees and expenses of litigation to a successful plaintiff without a controlling reason for such a classification.

In the case of *R. R. Co. v. Matthews*, 58 Kan. 447, affirmed by this Court (174 U. S. 96), a statute allowing attorneys' fees

in an action against a railroad company for damages caused by its negligence in permitting the escape of fire, was held to be in the nature of a police regulation to prevent carelessness in the use of a dangerous element, and the consequent destruction of property.

"The business of fire insurance has likewise assumed such a peculiar and special relation to the public welfare that the legislature is authorized to provide special penalties for breaches of contracts made in its prosecution." (*Assurance Co. v. Bradford*, 60 Kan. 82, 55 Pac. 335; *Fid. Mut. Life Assn. v. Mettler*, 185 U. S. 308, 22 Sup. Ct. 662, 46 L. Ed. 922.)

R. R. Co. v. Matthews, 174 U. S. 98-99.

Fid. Mut. Ins. Co. v. Mettler, 185 U. S. 308-327.

Each of these decisions were made upon the theory, and the statutes were sustained as constitutional upon the theory, that they were enacted by the states in the exercise of the police power, and as a police regulation, and therefore the classification was reasonable, and not arbitrary. But what police power of the state was involved or invoked when Section 5193, General Statutes Kansas 1901, was enacted? What reason is there for giving to the successful plaintiff in a *mandamus* suit a right and a privilege not enjoyed by the defendant in the same case? Why reward the plaintiff and punish the defendant? Why give to one party (the plaintiff) in litigation such privileges that will arm him with special and important pecuniary advantages over his antagonist?

"Justice should not be sold or denied by the exacting of a pecuniary consideration for its enjoyment from one when it is given freely and open-handed to another, and without money and without price." (165 U. S. 160.)

The defendant in this controversy did "not enter the courts upon equal terms" with the Mill Company. It "must pay attor-

neys' fees, if wrong." It may "not recover any if right," while the Mill Company recovers attorneys' fees, expenses of litigation, railroad fares, hotel bills "and incidentals," if right, and pay nothing if wrong. In this suit the defendant Company, as a party to this litigation, is discriminated against and not treated like the Mill Company. It does "not stand equal before the law" with the Mill Company. It does not receive equal protection under this statute. (165 U. S. 153.)

Concisely stated, the vice in the state statute (Sec. 5193, Genl. Stat. Kansas 1901) exists in the fact of an unreasonable and arbitrary discrimination in favor of the *plaintiff* in a *mandamus* suit, and against the defendant in *such* suit, whereby the defendant is denied the right to appeal to the courts upon equal terms with the plaintiff. It is immaterial what may be the question involved. The inequality of terms and conditions is justified *solely* upon the proposition that the party invoking the advantage over the defendant is the *plaintiff* in a *mandamus* suit.

What is there about an ordinary *mandamus* suit to enforce a private right that justifies such an invidious discrimination in favor of the *plaintiff* and against the defendant? Is not this statute "purely arbitrary, being without reasonable basis"?

a. Again, the attention of the Court is called to the fact that the state court, in order to enlarge the advantages of the Mill Company (the plaintiff) and make the discrimination against the defendant more pronounced, and the penalty more burdensome, placed a construction upon the word "damage," contained in the Act (Section 5193, Genl. Stat. 1901), unsupported by either reason or authority.

In the case of *Golder v. Land*, 50 Neb. 868-869, the court had under consideration the damages to be recovered by the plaintiff in a personal injury case, which included expenses

for medical services, and in discussing the right to recover expenses reasonably incurred, said:

"He may not recover his actual expense, regardless of its reasonableness. *On the other hand, he cannot speculate on this item of damages and recover what would be a reasonable expense unless he has in fact incurred it, either by payment or by becoming liable therefor. * * ** It is not the reasonable charge for medical services which he may recover, but the expense to him of such services, not to exceed their reasonable value."

In the case of *Morris v. Grave Ave.*, 144 Mo. 500, it was said:

"To entitle the plaintiff in a suit against a railroad for personal injuries to recover for medical services rendered him, he must show either that he has paid for the services or is liable therefor. *He cannot recover for a loss he has never sustained, nor for money he is not legally liable to pay.*"

And in that case it was further said that.

"To authorize a recovery on part of the injured plaintiff, there must have been an actual loss to him of time or money, or a liability that the same may or will occur." (144 Mo. 507.)

Or, as said by the state court in *Underhill v. Spencer*, 25 Kan. 71, the liability therefor must have "become fixed and absolute."

In the case of *Chicago v. Honey*, 10 Ill. (App.) 535, it was said that, to entitle the plaintiff to recover for medical attention, she "must show the amount of money actually paid, or that she had become legally liable to pay a certain sum therefor."

In the case of *McClure v. Scates*, 64 Kan. 284, relied on by the Mill Company, the court said:

"The plaintiff was entitled to recover as *damages* the *necessary outlay* for attorneys, as well as other loss and expenses resulting from the wrong of the defendants."

The Commissioner found that:

"I further find that it is mutually understood between the Mill Company and the attorneys named that whatever amount is recovered in this proceeding on account of fees and expenses of counsel will be paid by the Mill Company to and accepted by the attorneys as a full discharge of the liability to them."

There is no pretense that the Mill Company has paid the extravagant attorneys' fees which were allowed. There is no pretense that the Mill Company is under any obligation to the attorneys to pay the fees. On the contrary, the Commissioner finds that there was no such payment, and no such obligation.

The word "damage" has been construed, not only to reimburse the Mill Company for *all* expenses by it incurred, but enables it (not because it has been damaged, but because it is the *plaintiff* in a mandamus suit) to join in a speculation with its attorneys to punish the Railroad Company for attempting, in an orderly way, to establish what it believed to be its rights in the courts.

SECOND.

The Supreme Court of Kansas erred in holding and deciding, contrary to the contention and claim of the defendant, and contrary to law, that the Judiciary Act of Congress (Sections 999, 1000, 1003, 1010, Compiled

Statutes United States, 1901, Vol. 1) did not deprive the Supreme Court of Kansas of jurisdiction to assess damages against the defendant alleged to have accrued after the rendition of final judgment by it, and after such judgment had been superseded, as provided by said Judiciary Act, and was pending in the Supreme Court of the United States; and in holding that the allowance of the writ of error heretofore allowed herein did not operate to remove the suit from the Supreme Court of the State to the Supreme Court of the United States, and in holding that the Mill Company might recover in this proceeding damages and expenses, including attorneys' fees, which accrued AFTER the giving of the supersedeas bond, and during the time said proceedings were pending in the Supreme Court of the United States; and in holding and deciding that it had jurisdiction to render judgment against the Missouri Pacific Railway Company for expenses incurred and attorneys' fees in defending the proceeding in error in the Supreme Court of the United States; and in refusing to hold that if attorneys' fees for services in defending the action in the Supreme Court of the United States, and expenses incident thereto, are recoverable at all, the same should be determined by that court, or in a proceeding on the supersedeas bond, and not by the Supreme Court of the State of Kansas in this proceeding; and, in allowing such claim, acted without jurisdiction, and deprived the Railway Company of its property without due process of law, and denied to it the equal protection of the law.

The final judgment of the state court awarding the peremptory mandamus, as prayed for in the alternative writ (Rec., pp. 92-94) was entered on the 8th day of December, 1906. (Rec., p. 100.) On the 24th day of December, 1906 (Rec., p. 104), a writ of error was granted to the Supreme

Court of Kansas, upon the condition that the defendant Railway Company "should give to the plaintiff a good and sufficient bond in the sum of twenty thousand dollars (\$20,000), conditioned that said defendant should prosecute its writ of error to effect, and, if it failed to make good its plea, should pay all damages and costs, etc." (Rec., p. 104.) Said bond was given, and approved, "and to operate as a supersedeas (Rec., p. 195), and the transcript of the record duly filed in this Court. Such proceeding in error was prosecuted in accordance with and in pursuance of the following sections of the Judiciary Act of the United States, 1901, pages 712-715, viz.:

"Every justice or judge signing a citation on any writ of error shall, except in cases brought up by the United States, or by direction of any department of the Government, take good and sufficient security that the plaintiff in error or the appellant shall prosecute his writ or appeal to effect, and, if he fail to make good his plea, shall answer all damages and costs, where the writ is a supersedeas, and stays execution, or all costs only where it is not a supersedeas as aforesaid.

Writs of error from the Supreme Court to a state court in cases authorized by law shall be issued in the same manner, and under the same regulations, and shall have the same effect, as if the judgment or decree complained of had been rendered or passed in a court of the United States.

Where, upon a writ of error, judgment is affirmed in the Supreme Court or a Circuit Court, the court shall adjudge to the respondents in error just damages for his delay, and single or double costs, at its discretion."

It will hardly be contended that these sections of that Act did not give the defendant the *right* to institute the proceedings in error in this Court to review the final judgment of the state court, unencumbered with any conditions except those imposed by the Act which gave the right. These conditions were complied with, and this Court acquired jurisdiction of the

controversy and retained that jurisdiction until decided, and the mandate of this Court lodged with the state court. The state court had entered its final judgment on December 8, 1906, and the question reviewed by this Court was whether that judgment should be reversed, modified or affirmed. It was affirmed. Thereafter the Supreme Court of Kansas, in awarding damages to the Mill Company under Section 5193, Genl. Stat. 1901, by its construction of Sections 999, 1000, 1003, 1010, Judiciary Act cited *supra*, amends such sections by writing into them a condition of exercising a *right* thereunder never contemplated by Congress, and unsupported by a known precedent. It held and decided that:

"1. The Judiciary Act (Rev. Stat. U. S.) was not intended to affect, and does not affect, the jurisdiction of this Court.

2. The jurisdiction of this Court in mandamus attaches upon the issuance of the alternative writ, and *continues unabated*, not only until the peremptory writ issues, but until obedience thereto is enforced.

3. The allowance of the writ of error did not operate to remove the suit from the Supreme Court of the State to the Supreme Court of the United States, but merely operated to bring up the record for review.

4. The allowance of the writ of error did not supersede the judgment; the taking of the bond brought about the supersedeas.

5. The damages in mandamus proceedings comprehended by Section 723 of the Code (Genl. Stat. 1909, Sec. 6319) are the injuries sustained as the natural and probable consequences of the *wrongful* refusal to comply and the expenses reasonably and necessarily incurred in compelling compliance with the alternative writ, including reasonable attorneys' fees in this Court and in the Supreme Court of the United States."

By this construction the state court has, in effect, nullified these federal statutes and made them unavailing to a party litigant believing himself aggrieved by a decision of a state

court. The condition of exercising the *right* given by the Judiciary Act, as written into it by the Kansas court, is so burdensome as to be almost prohibitive.

The case at bar is a fair and forcible illustration of the absurdity of the rule adopted by the state court. As soon as the mandate of this Court is filed in the state court, the attorneys of the Mill Company quickly convert the mandamus suit unto an unseemly scramble to punish the defendant for exercising a *right*, by presenting a claim for attorneys' fees in *this* Court, as follows (Rec., p. 107) :

Waters & Waters, for services in this Court.....	\$40,000.00
Printing brief in this Court.....	193.50
Railroad fare, hotel bills and reasonable expenses in attending on U. S. Supreme Court, April, 1908..	500.00
Waters & Smith, railroad fare, hotel bills and reasonable expenses in attending on U. S. Supreme Court, October, 1908.....	480.60
Rossington & Smith, services in U. S. Court, assisting Waters.	30,000.00
John F. Switzer, assisting Waters in U. S. Supreme Court.	5,000.00
	<hr/>
	\$76,173.60

And the Supreme Court of Kansas proceeded gravely to consider it by appointing a Commissioner, who, after hearing the evidence, excluded *all* of the expert evidence as to the reasonableness of these charges by holding that:

"Upon consideration of the circumstances of the giving their testimony by the several opinion witnesses, and the remarkable line and width of cleavage between those called by the Mill Company and those called by the Pacific Company, I conclude that none of them has given the elements of the case such study and consideration as that this Court would be justified in adopting the opinions of any of them as a basis for its judgment as to the value

of the services of the attorneys in the case in the Supreme Court of the United States for the amount of which the Mill Company had become liable."

And substituted his own *opinion*, unsupported by evidence, and allowed of these claims the sum of \$11,480 (Rec., p. 42), which was approved by the state court (Rec., p. 274) in the following language:

"The Commissioner, calling to his aid his own general knowledge and professional experience, and considering all the circumstances in evidence, 'the character and the importance of the litigation, the labor and time necessarily involved therein, and the result of the same (*Noftzger v. Moffett*, 63 Kan. 354-359), proceeded to find the several amounts which he believed to be reasonable compensation for the services rendered. This he was warranted in doing."

The Commissioner, in his report, referring to the claims of the attorneys for services and expenses in the Supreme Court of the United States, says:

"It was reasonably necessary for the Mill Company to employ counsel to represent it in the Supreme Court of the United States of professional standing, learning and experience, to adequately combat the contentions and answers and arguments of counsel for the Pacific Company.

For this purpose the Mill Company employed, in addition to Waters & Waters, W. H. Rossington, Charles Blood Smith and John F. Switzer, who were well equipped and qualified to adequately present the case of the Mill Company to the Supreme Court of the United States.

The compensation and expenses of these gentlemen under that employment constitute the ninth, tenth, eleventh, twelfth, thirteenth, fourteenth and fifteenth claims of damages filed by the Mill Company.

It is objected by the Pacific Company that these items cannot be allowed for the reason that these were expenses

incurred in a matter pending in the Supreme Court of the United States, and not in this Court; that the Judiciary Act of the United States requires that on allowance of a writ of error to that court from the Supreme Court of a state, a bond shall be taken, conditioned that the plaintiff in error shall answer all damages where there is a supersedeas, and where judgment is affirmed the court shall adjudge to the respondent in error just damages for his delay. That there was a supersedeas in this case; that, by reason of the provisions of the Judiciary Act, this Court is deprived of all power to allow as damages in this proceeding any damage, outlay or expense incurred as a result of the proceeding in error; that the only remedy of the Mill Company on the claims specified would be an application to the Supreme Court of the United States for their allowance, or by an action upon the supersedeas bond, and that the Supreme Court of the United States did allow the Mill Company \$20 as and for counsel fees in that court.

Upon this objection I conclude:

That the jurisdiction of this Court in mandamus is the creation of the Constitution and the statutes of the State of Kansas.

That this Court is the sole judge of what the Constitution and those statutes provide.

That the jurisdiction of this Court in mandamus over persons within its jurisdiction cannot be affected by Act of Congress.

That the Judiciary Act does not and was not intended to affect the jurisdiction of this Court.

That the jurisdiction of this Court in mandamus attaches upon the issuance of the alternative writ, and the subject matter of the proceeding being the awarding a peremptory mandamus, that jurisdiction continues unabated, not only until the writ is awarded, but also until the writ is issued and obedience to it enforced.

That the alternative writ is a command of the performance of specified and prescribed duties; and return to the writ is a refusal to perform the duties prescribed; the judgment awarding a peremptory mandamus is a conclusive adjudication that such refusal was wrongful, and the act of the Court compelling compliance with the command of the alternative writ.

That the damages comprehended by the Kansas statute are the injuries sustained as the natural and probable consequence of the wrongful refusal to comply, and the expenses reasonably and necessarily incurred in compelling compliance with the command of the alternative writ.

That the allowance of the writ of error did not operate to remove the suit from the Supreme Court of the State into the Supreme Court of the United States; its only effect was to bring up the record for purposes of review.

The allowance of the writ of error did not operate as a supersedeas; the taking of the supersedeas bond brought about the supersedeas. The taking of the bond, and the supersedeas itself, in so far as it can be conceived of as a substantial act, was the action of the Supreme Court of Kansas.

I conclude that the objection should be disallowed and a claim for the reasonable compensation of the attorneys mentioned for their services in the case in the Supreme Court of the United States, and their reasonable and necessary expenses, should be allowed as part of the damages sustained by the Mill Company. I find that no agreement has ever been had between the Mill Company and any of the attorneys as to the amount of their compensation; that neither of the attorneys has at any time entered on his books a charge against the Mill Company for services rendered, nor have they informed the Mill Company of the amount intended to be charged; nor have they determined in their own minds any definite amount intended to be charged.

I find that the attorneys will claim the full amount and will accept whatever amount that shall be determined by this Court in this proceeding to be a reasonable compensation for their services in the case and allowed as part of the damages.

I further find that it is mutually understood between the Mill Company and the attorneys named that whatever amount is recovered in this proceeding on account of fees and expenses of counsel will be paid by the Mill Company to and accepted by the attorneys as a full discharge of the liability to them."

The state court, in approving the report and conclusions on these claims, and the Commissioner's reasons for allowing the same, says (Rec., p. 273) :

"Again, the conclusions of the learned Commissioner are so clearly and forcibly stated we adopt them as a part of our opinion."

These conclusions or findings will be presented and discussed in the order stated in the Commissioner's report (Rec., pp. 31-33) :

a. "That the jurisdiction of this Court in mandamus is the creation of the Constitution and statutes of the State of Kansas."

The Constitution of the State of Kansas (Sec. 3, Art. 3, Genl. Stat. 1901, p. 44) provides that :

"Sec. 3. The Supreme Court shall have original jurisdiction in proceedings in *quo warranto*, mandamus and *habeas corpus*, etc."

The foregoing is the constitutional limitation upon the original jurisdiction of the Supreme Court of Kansas. It will be conceded that, under this constitutional provision, the Supreme Court was vested with original jurisdiction in mandamus to issue the writ and enforce obedience.

Defining the purpose of the writ, the Court, in *Sharpless v. Buckles*, 65 Kan. 838, said that :

"The only purpose of a writ of mandamus is to require the person to whom it is issued to perform some act which the law enjoins as a duty. The writ itself confers no power and creates no duty, and its only office is to command the exercise of a power already possessed, or the performance of a duty already imposed."

Is the term "mandamus," as used in the state Constitution, broad enough to include power in the legislature to vest in the Supreme Court of the state original jurisdiction to inflict a *penalty* upon the defendant by way of "damages" for exercising a *right* guaranteed to it by the Constitution of the United States and the laws of Congress passed in pursuance thereof? Is it due process of law for the Supreme Court of the state, under such a limited and restricted power, to exercise any such jurisdiction? It is doubtful whether the legislature had the constitutional power to vest in the Supreme Court of the state jurisdiction to assess any damages to the plaintiff in the same proceeding which accrued up to the final judgment awarding the peremptory writ; but, be that as it may, can there be any question as to the correctness of the proposition that, when the alternative writ and the issues joined thereby had become merged into a "final judgment" awarding a peremptory writ, the Supreme Court had exhausted its jurisdiction, except to enforce obedience to the final judgment, and this jurisdiction was suspended and superseded by the proceedings in error, if a bond is taken as provided by Section 1000, General Statutes U. S. 1901?

Again, the Commissioner concluded (Rec., p. 32), and the state court approves (Rec., p. 268), that:

b. "That this Court is the *sole* judge of what the Constitution and those statutes provide."

This may be true as an abstract proposition, but the Constitution of the United States, and the "laws made in pursuance thereof, * * * shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

Again, the Commissioner concludes (Rec., p. 32), approved by the Supreme Court (Rec., p. 268) :

c. "That the jurisdiction of this Court *in mandamus* over persons within its jurisdiction cannot be affected by Act of Congress."

This very extraordinary and wholly unintelligible proposition was approved by the state court. It would seem that it was the intention to affirm and declare that the sections of the Judiciary Act cited *supra* have no efficacy whatever, and the state court in no manner bound thereby; and this is made apparent by the further conclusion of the Commissioner (Rec., p. 32), approved by the state court (Rec., p. 268) :

d. "That the Judiciary Act does not and was not intended to affect the jurisdiction of this Court."

And

e. "That the allowance of the writ of error did not operate to remove the suit from the Supreme Court of the state into the Supreme Court of the United States; its only effect was to bring up the record for purposes of review.

The allowance of the writ of error did not operate as a supersedeas; the taking of the supersedeas bond brought about the supersedeas. The taking of the bond, and the supersedeas itself, in so far as it can be conceived of as a substantial act, was the action of the Supreme Court of Kansas."

And thereon the Commissioner concludes (Rec., p. 33) that the "claim for the reasonable compensation of the attorneys mentioned for their services in the case in the Supreme Court of the United States, and their reasonable and necessary expenses, should be allowed as part of the damages sustained by the Mill Company."

The state court, in approving this conclusion of the Commissioner's, said that (Rec., p. 269) :

"The damages in mandamus proceedings comprehended by Section 723 of the Code (Gen'l Stat. 1909, Sec. 6319) are the injuries sustained as the natural and probable consequences of the wrongful refusal to comply and the expenses reasonably and necessarily incurred in compelling compliance with the alternative writ, including reasonable attorneys' fees in this Court and in the Supreme Court of the United States."

The state court, in order to reach the foregoing conclusions (a, b, c, d and e) must necessarily have concluded that the Constitution of the United States, and "laws made in pursuance thereof," had ceased to be the supreme law of the land, and the judges of the state court no longer bound thereby, or it would not have held and decided "that the jurisdiction of this Court (Kansas Supreme Court) in mandamus over persons within its jurisdiction cannot be affected by Act of Congress." This decision of the state court was made necessary in order to justify that Court in holding that the Mill Company might recover damages alleged to have accrued *after* the date of its final judgment, December 8, 1906, including attorneys' fees, railroad fare, incidentals, etc., incurred or expended while this cause was pending in this Court. If the writ of error suspended the enforcement of that judgment, then clearly that court had no jurisdiction while the controversy was properly pending in this Court. Nevertheless, that court held:

"That the Judiciary Act does not and was not intended to affect the jurisdiction of this court."

And

"That the allowance of the writ of error did not operate to remove the suit from the Supreme Court of the

state to the Supreme Court of the United States; its only effect was to bring up the record for purposes of review."

Again, the court holds that:

"The allowance of the writ of error did not operate as a supersedeas. The taking the bond, and the supersedeas itself, in so far as it can be conceived of as a substantial act, was the action of the Supreme Court of Kansas."

It will be well to here examine the sections of the Judiciary Act (Vol. 1, U. S. Comp. Stat. 1901, Secs. 999, 1000, 1003, 1010), which read as follows, viz.:

(999.) "When the writ is issued by the Supreme Court to a Circuit Court, the citation shall be signed by a judge of such Circuit Court, or by a justice of the Supreme Court, and the adverse party shall have at least thirty days' notice; and when it is issued by the Supreme Court to a state court the citation shall be signed by the Chief Justice or judge or chancellor of such court, rendering the judgment or passing the decree complained of, or by a justice of the Supreme Court of the United States, and the adverse party shall have at least thirty days' notice."

(1000.) "Every justice or judge signing a citation on any writ of error shall, except in cases brought up by the United States or by direction of any department of the Government, take good and sufficient security that the plaintiff in error or the appellant shall prosecute his writ or appeal to effect, and, if he fail to make his plea good, shall answer all damages and costs where the writ is a supersedeas and stays execution, or all costs only where it is not a supersedeas as aforesaid."

(1003.) "Writs of error from the Supreme Court to a state court in cases authorized by law shall be issued in the same manner, and under the same regulations, and shall have the same effect, as if the judgment or decree complained of had been rendered or passed in a court of the United States."

(1010.) "Where, upon a writ of error, judgment is affirmed in the Supreme Court or a Circuit Court, the

court shall adjudge to the respondents in error just damages for his delay, and single or double costs, at its discretion."

It is provided by Rule 23 of this Court that:

"In all cases where a writ of error shall delay the inferior court, and shall appear to have been sued out merely for delay, damages at the rate not exceeding 10 per cent, in addition to interest, shall be awarded upon the amount of the judgment."

And by Rule 38:

"The provisions of Rules 23 and 24 of this Court in regard to interest and costs and fees shall apply to writs of error and appeals and reviews, under the provisions of Sections 5 and 6 of the said Act."

If the Mill Company sustained any damage because the enforcement of the "final judgment" was delayed, superseded and suspended by the writ of error, what court had jurisdiction to ascertain and assess such damage? The right to a writ of error is created by the Judiciary Act (Secs. 999, 1000, 1003, 1010 *supra*). It is provided by Section 1010, when, upon writ of error, judgment is affirmed by this Court, it "shall adjudge to the respondents in error just damages for his delay, and single or double costs, at its discretion."

Justice Porter of the Supreme Court of Kansas says that this Act of Congress does not and cannot affect the jurisdiction of this Court in a *mandamus* case, although we will hereafter show, by numberless decisions of this Court, that it does; and there cannot be found in the books a decision—state or Federal—sustaining the contention of Justice Porter of the state court. That court seems to act upon the assumption that a *mandamus* suit is sacred in its character and, once instituted in that court, the Constitution of the United States, and the laws made in

pursuance thereof, are at once subordinated to its unbridled license and power.

This Court acquired jurisdiction of the writ of error and the proceedings invoked thereby only by virtue of the Judiciary Acts. The rule is uniform that:

"In allowing a writ of error from this court to the highest court of a state, and in issuing a citation, the Chief Justice of that court does but exercise an authority vested by Congress in him concurrently with each of the justices of this court."

Felix v. Schanneber, 125 U. S. 59.

Mr. Justice Porter, however, of the state court, affirms the novel and heretofore unheard of proposition that the allowance of the writ of error, and "the taking of the bond and the supersedeas itself, in so far as it can be conceived of as a substantial act, *was the action of the Supreme Court of Kansas.*"

It is provided by Section 1, Article 3, of the Constitution of the United States, that: "The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish"; and it is idle to say that, in allowing writs of error from the United States Supreme Court to the state court, the "*Supreme Court of Kansas*" had any jurisdiction in the premises. It was not the action of *the court*, but the power vested in the Chief Justice by virtue of Section 999 of the Judiciary Act, and he did "but exercise an authority vested by Congress in him concurrently with each of the justices of this Court."

This conclusion of the learned justice of the state court was made the basis of the court's decision that this Court had no jurisdiction to assess damages for delay, etc., on affirming the judgment of the state court, but that power remained ex-

clusively with the state court, notwithstanding it is provided by Section 1010 of the Judiciary Act that:

"Where, upon a writ of error, judgment is affirmed in the Supreme Court or a Circuit Court, the court *shall* adjudge to the respondents in error just damages for his delay, and single or double costs, at its discretion."

This question has many times been before this Court. In the case of *Arcambel v. Wiseman*, 3 Dal. (U. S.) 306, the decree of the District Court of Rhode Island was affirmed in this Court. It appeared that "a charge of \$1,600 for counsel fees in the court below had been allowed. It was said by this Court:

"We do not think that this charge ought to be allowed. The general practice of the United States is in opposition to it; and even if that practice were not strictly correct in principle, it is entitled to the respect of the court till it is changed or modified by statute."

And this decision was approved by this Court in *Oelrich v. Spain*, 15 Wal. 230-231.

In the case of *Boyce v. Grundy*, 9 Pet. (U. S.) 275, it was said that:

"By the Judiciary Act of 1789, C. 20, Art. 23, the Supreme Court is authorized, in cases of affirmance of any judgment or decree, to award to the respondent just damages for his delay. And by the rules of the Supreme Court, made in February term, 1803, and February term, 1807, in cases where the suit is for mere delay, damages are to be awarded at the rate of 10 per centum per annum on the amount of the judgment, to the time of the affirmance thereof. And in cases where there is a real controversy, the damages are to be at the rate of 6 per cent per annum only. And in both cases the interest is to be computed as part of the damages. It is, therefore, solely

for the decision of the Supreme Court whether any damages or interest (as a part thereof) are to be allowed or not in cases of affirmance. If upon the affirmance no allowance of interest or damages is made, *it is equivalent to a denial of any interest or damages*; and the Circuit Court, in carrying into effect the decree of affirmance, cannot enlarge the amount thereby decreed, but is limited to the mere execution of the decree in the terms in which it is expressed. A decree of the Circuit Court allowing interest in such a case is, to all intents and purposes, *quoad hoc*, a new decree, extending the former decree. In *Rose v. Himely*, 5 Cranch 313, it was said that upon an appeal from a mandate nothing is before the court but the proceedings subsequent to the mandate; and the court refused to allow interest in that case, which was given by the Circuit Court in executing the mandate, because it was not awarded by the Supreme Court upon the first appeal. The same point was fully examined in the case of *The Santa Maria*, 10 Wheat. 431, 442, where the court held that interest or damages could not be given by the Circuit Court in the execution of a mandate where the same had not been decreed by the Supreme Court upon the original appeal."

In the case of *In re Washington, etc.*, 140 U. S. 96-97, this Court held and decided that:

"The principle has been well established in numerous cases that on a mandate from this court, containing a specific direction to the inferior court to enter a specific judgment, the latter court has no authority to do anything but to execute the mandate. (*Ex parte Dubuque & Pacific Railroad*, 1 Wall. 69; *Durant v. Essex Company*, 101 U. S. 555, 556.)

The case of *Boyce's Executors v. Grundy*, 9 Pet. 275, is very much in point. In that case this court had entered a decree simply affirming the decree below with costs, and had sent down a mandate commanding the inferior court, in the terms of the mandate in the present case, "that such execution and proceedings be had in said cause as, according to right and justice and the laws of the United States, ought to be had, the said appeal notwith-

standing.' On receiving the mandate, the court below varied its former decree, and, among other things, awarded an additional amount of money intended to be interest upon the original sum decreed, from the time of the rendition of the decree in the court below to the time of the affirmance in this court. This court, on appeal, after referring to the statute which authorized it, in case of affirmance, to award to the respondent just damages for his delay, and to the rules of this court, made in 1803 and 1807, prescribing an award of damages in cases where the suit in this court is for mere delay, said: 'It is, therefore, solely for the decision of the Supreme Court whether any damages or interest (as a part thereof) are to be allowed or not in cases of affirmance. If upon the affirmance no allowance of interest or damages is made, it is equivalent to a denial of any interest or damages, and the Circuit Court, in carrying into effect the decree of affirmance, cannot enlarge the amount thereby decreed, but is limited to the mere execution of the decree in the terms in which it is expressed. A decree of the Circuit Court allowing interest in such a case is, to all intents and purposes, *quoad hoc*, a new decree, extending the former decree,' citing *Himely v. Rose*, 5 Cranch 313, and *The Santa Maria*, 10 Wheat. 431, 442. See also *Bank of U. S. v. Moss*, 6 How. 31."

The state court, however, held (Rec., p. 268):

"That the jurisdiction of this court *in mandamus* over persons within its jurisdiction cannot be affected by Act of Congress."

And

"That the Judiciary Act does not and was not intended to affect the jurisdiction of this court."

And thereupon, notwithstanding the power vested in this Court by Section 1010 of the Judiciary Act *supra*, proceeds to render judgment against the Railway Company for damages to the Mill Company for *delay* in enforcing the judgment of the

state court, of date December 8, 1906, which "damage" is based upon Section 5193, General Statutes of Kansas 1901, and includes every item of expense which the avarice of man could conceive of, allowed by the Supreme Court of Kansas as legitimate expenses of litigation in *defending* the proceedings in error in this Court, viz., attorneys' fees, printing briefs, railroad and sleeping car fares, hotel bills, street car fares in Washington, D. C., hotel bills of attorneys (for self and friends), per diem of members of the Mill Company before the Commissioner, while their attorneys were endeavoring to establish a claim of \$75,000 for themselves and numerous associates, all of which accrued after this whole controversy was removed into this Court by proceedings in error under the Judiciary Act, which operated as a supersedeas.

The court below (through its Commissioner and Justice Porter, who approved everything that was done by the Commissioner, even to the brief prepared by him in behalf of attorneys for the Mill Company) held and decided that, this being a mandamus suit, this Court had no jurisdiction in the premises; that Section 1010 of the Judiciary Act and Rule 23 of this Court were inoperative and meaningless.

The Court's attention, as shown by the record, was time and again called to the case of *U. S. v. Addison*, 22 How. (U. S.) 185, in which this Court decided that:

"The bond and security given on the writ of error cannot be regarded as an idle ceremony. It was designed as an indemnity to the defendant in error should the plaintiff fail to prosecute with effect his writ of error."

But, inasmuch as the Commissioner had ignored the contention that a supersedeas bond was intended for *some* purpose by the Judiciary Act, Mr. Justice Porter did likewise, because "this was a *mandamus* suit," and the Judiciary Act

had no application; and, notwithstanding the many decisions of this Court under Section 1010 of the Judiciary Act, and Rule 23 of this Court, that it had the power, on affirming a judgment of a state court, to assess damages, etc., to the defendant in error for delay in enforcement of his judgment, the Supreme Court of Kansas (through the Commissioner and Mr. Justice Porter) held that it had no such right, and no such power, because this was a *mandamus* case, and no Act of Congress or provision of the Federal Constitution could affect or infringe upon the jurisdiction of the Kansas court in a *mandamus* case.

In the case of *Amory v. Amory*, 91 U. S. 356, it was said that:

“The court will not hesitate to exercise its power to adjudge damages where it finds that its jurisdiction has been invoked merely to gain time.”

In the case of *Ry. Co. v. Foley*, 94 U. S. 100, this Court, on affirming a judgment, exercised its power under Section 1010 of the Judiciary Act *supra*, and allowed, in addition to interest, damages in the sum of \$500.

Whitney v. Cook, 99 U. S. 607.

The state court allowed the damages to the Mill Company, not because of any section of the Judiciary Act, or because of any obligation of the supersedeas bond, but solely because of Section 5641, General Statutes of Kansas 1901 (Sec. 723, Chap. 182, Laws 1909), “for the injuries sustained as the natural and probable consequences of the *wrongful* refusal to comply, and the expenses reasonably and necessarily incurred in compelling compliance with the *alternative* writ, including reasonable attorneys’ fees in this Court, and the Supreme

Court of the United States." (85 Kan. 215.) The alternative writ had spent its force by being merged in the "final judgment" (Dec. 8, 1906). That judgment was suspended by proper proceedings under Sections 999, 1000, 1003 and 1010 of the Judiciary Act. A proper bond was given, as required by the Act of Congress, to secure a stay or suspension of the judgment. In doing so, the Railway Company but exercised a lawful statutory right. The Supreme Court of Kansas, however, says the exercise of this lawful right was *wrongful*, because the Railway Company neglected to comply with the *alternative writ after* it had been merged into a final judgment, and that, in defending the proceedings in error in this Court, the Mill Company incurred expenses and sustained damages in *thereby* compelling compliance with the *alternative writ*.

In order to reach this novel conclusion, the Supreme Court of Kansas was compelled to and did not hesitate to nullify and destroy the force, effect and purpose of the Judiciary Act. *The state court, by its decision, has construed and written into the Judiciary Acts of Congress a most extraordinary penalty against a defendant in a mandamus suit who seeks, by lawful means, to have this Court review and correct the judgment of the state court.* It has established a precedent which, in its operation and effect, compels a defendant in a *mandamus* case to pay an army of attorneys for the plaintiff as a condition of exercising a statutory right not required of any other defendant in any other kind of litigation in which this Court is asked to review the judgment of a state court.

The Railway Company cannot get into this Court in a *mandamus* case on equal terms with the Mill Company.

Oelrich v. Spain, 15 Wal. 230, 231.

As said by Mr. Justice Vandeventer, *In re St. L. I. M. & S. R. R. Co. v. Wynne*, 224 U. S. 354:

"It takes property from one and gives it to another. not because of a breach by the former of a duty to the latter, or to the public, but because of *the lawful exercise of an undoubted right*. Plainly this cannot be done consistently with due process of law."

When the proceedings in error were perfected, and the supersedeas allowed, as provided by the Judiciary Act, the jurisdiction of the state court was transferred by force of the statute. The State Court, however, holds that:

"The jurisdiction of this court in *mandamus* attaches upon the issuance of the alternative writ, and *continues unabated*, not only until the peremptory writ issues, but until obedience thereto is enforced." (Rec., p. 268.)

In the case of *Keyser v. Farr*, 105 U. S. 265, 266, it was said:

"After the acceptance of the bond for the appeal, and the docketing of the cause in this court, the jurisdiction of the court below was gone."

Draper v. Davis, 102 U. S. 370.

The Supreme Court of Kansas, however, says (through the Commissioner and Mr. Justice Porter) that the jurisdiction of the State Court (in a *mandamus* case) "continues unabated." (85 Kan. 214.)

In the Slaughter House cases, 10 Wal. 273, it was held that:

"A writ of error has effect to remove the record into the court granting the writ, and when the conditions prescribed in the 23rd section of the Judiciary Act are complied with, the jurisdiction of the subordinate court is suspended until the cause is remanded from the Appellate Court.

Neither appeals nor writs of error become a supersedeas and stay of execution by virtue merely of process issued by this court; but this effect is *derived from the Judiciary Act on complying with its conditions.*"

It seems, therefore, to be the settled rule of this Court that, after the allowance of the writ, and complying with the Judiciary Act, "the jurisdiction is transferred from the court below, and from that time the suit is cognizable only in this Court," and not subject to any control of the state court. This is the recognized rule in all of the state courts, except in Kansas, which, through the Commissioner and Mr. Justice Porter, makes an exception in *mandamus* cases.

The proceedings in error instituted in this Court by the Missouri Pacific against the Mill Company was an independent proceeding, permitted and authorized ONLY by the Judiciary Act of Congress. (Secs. 999, 1000, 1003, 1010.)

This Court, in construing the Judiciary Act, uniformly holds that the state court has no part in permitting such proceedings; that the Chief Justice, in allowing the writ of error, and in issuing the citation, "but exercises an authority vested in him concurrently with the Justices of this Court."

Felix v. Scharmeber, 125 U. S. 59.

He gets no authority to allow a writ of error from any state statute. The jurisdiction of this Court in such a proceeding is derived exclusively from the Constitution of the United States, and the laws of Congress passed in pursuance

thereof. If a Federal question is involved, the party aggrieved by an adverse decision of the State Court may, *by complying with the conditions and requirements of the Judiciary Act of Congress*, invoke the jurisdiction of this Court to secure relief. The State Court is vested with no power or jurisdiction to impose any condition, burden or requirement upon the exercise of the *right* given by the Judiciary Act not imposed by that Act. The Railway Company, in order to supersede the judgment of the State Court, gave a bond, as required by the Judiciary Act. The State Court holds (85 Kan. 215):

"The allowance of the writ of error did not supersede the judgment; the taking of the bond brought about the supersedeas."

As said by this Court, *In re Tullock v. Mulvane*, 184 U. S. 512:

"The giving of such a bond was an act done pursuant to an authority exercised under the Constitution and laws of the United States."

Nevertheless, the State Court ignores the obligation fixed by the bond, which "brought about the supersedeas," and assessed damages, such as attorneys' fees, expenses of litigation, railroad fare, hotel bills, incidentals, etc., under Section 5193, Genl. Stat. Kansas 1901 (being Section 723, Chap. 182, Laws Kansas 1909), thereby nullifying and abrogating the Judiciary Act of Congress. (Secs. 999, 1000, 1003, 1010.)

In order to reach such a conclusion, the State Court was compelled to hold, and did hold, that the proceedings in error did not affect, take away or impair the jurisdiction of the State Court, and that attorneys' fees, etc., in defending the proceedings in error in this Court, accrued as damages under Section 5193, Genl. Stat. Kansas, 1901, *supra*, and could be recovered *as such*, independent of the Judiciary Act of Con-

gress, and the decision of this Court *In re Tullock v. Mulvane*, 184 U. S. 497-524, in which it was held that:

"A bond given in pursuance of a law of the United States is governed, as to its construction, not by the local law of a particular state, but by the principles of law as determined by this Court, and operative throughout the courts of the United States."

The Court further said:

"The jurisdiction to review being then established, it remains only to consider whether the attorneys' fees were properly allowed by the court below as an element of damages on the bond. That they were not is settled.

In *Oelrichs v. Spain*, 15 Wall. 211, this Court, speaking through Mr. Justice Swayne, said (p. 230):

"The decree of the court below was preceded by the report of a master, which the decree affirmed and followed. Upon looking into the report, we find it clear and able, and we are entirely satisfied with it, except in one particular. We think that both the master and the court erred in allowing counsel fees as a part of the damages covered by the bonds."

In *Arcambel v. Wiseman*, 3 Dall. 306, decided by this Court in 1796, it appeared 'by an estimate of the damages upon which the decree was founded, and which was annexed to the record, that a charge of \$1,600 for counsel fees in the courts below had been allowed.' This Court held that it 'ought not to have been allowed.' The report is very brief. The nature of the case does not appear. It is the settled rule that counsel fees cannot be included in the damages to be recovered for the infringement of a patent. *Tesse v. Huntington*, 23 How. 2 (64 U. S. XVI, 479); *Whittemore v. Cutter*, 1 Gall. 429; *Stimson v. The Railroads*, 1 Wall. Jr. 164. They cannot be allowed to the gaining side in admiralty as incident to the judgment beyond the costs and fees allowed by the statute. *The Baltimore*, 8 Wall. 378 (75 U. S. XIX, 463.)

In actions of trespass where there are no circumstances of aggravation, only compensatory damages can be recovered, and they do not include the fees of counsel. The plaintiff is no more entitled to them, if he succeed,

than is the defendant if the plaintiff be defeated. Why should a distinction be made between them? In certain actions *ex delicto* vindictive damages may be given by the jury. In regard to that class of cases this Court has said: 'It is true that damages assessed by way of example may indirectly compensate the plaintiff for money expended in counsel fees, but the amount of these fees cannot be taken as the measure of punishment or a necessary element in its infliction.' *Day v. Woodworth*, 13 How. 370, 371.

The point here in question has never been expressly decided by this Court, but it is clearly within the reasoning of the case last referred to, and we think is substantially determined by that adjudication. In debt, covenant and *assumpsit* damages are recovered, but counsel fees are never included. So in equity cases, where there is no injunction bond, only the taxable costs are allowed to the complainants. The same rule is applied to the defendant, however unjust the litigation on the other side, and however large the *expensa litis* to which he may have been subjected. The parties in this respect are upon a footing of equality. There is no fixed standard by which the *honorarium* can be measured. Some counsel demand much more than others. Some clients are willing to pay more than others. More counsel may be employed than are necessary. When both client and counsel know that the fees are to be paid by the other party, there is danger of abuse. A reference to a master, or an issue to a jury, might be necessary to ascertain the proper amount, and this granted litigation might possibly be more animated and protracted than that in the original cause. It would be an office of some delicacy on the part of the court to scale down the charges, as might sometimes be necessary.

We think the principle of disallowance rests on a solid foundation, and that the opposite rule is forbidden by the analogues of the law and sound public policy.

It is strenuously urged, however, and this was in effect the view taken by the court below, that, although the rule against allowing attorneys' fees in actions on injunction bonds was thus settled by this Court adverse to the right to recover such fees, as the local law was to the contrary, the injunction bond given in the Federal

Court must be enforced, not by the law of the forum in which it was given, but according to the rule of the local law. This proposition again, however, but embodies the contention that the question of the allowance of attorneys' fees involved no Federal question, which has already been disposed of. For if it be true, and it undoubtedly is, that the giving of such a bond was an act done pursuant to an authority exercised under the Constitution and laws of the United States, it must follow that the bond so taken is to be interpreted with reference to the authority under which it was given and the principles of jurisprudence controlling such authority, and not by the local law. To hold the contrary, as we have previously pointed out, would be but to declare that, although the power conferred by Congress upon this Court to adopt equity rules is controlling, nevertheless the interpretations of the rules and the limitations which arise from a proper construction of them, as expounded by this Court, and enunciated in its decisions, are without avail. And this yet further points out the fallacy involved in the contention that the lower court, in passing upon the issues, decided merely a question of general law involving no Federal controversy. Now it is at once conceded that the decision by a State Court of a question of local or of general law involving no Federal element does not as a matter of course present a Federal question. But where, on the contrary, a Federal element is specially averred and essentially involved, the duty of this Court to apply to such Federal question its own conceptions of the general law we think is incontrovertible. *Avery v. Popper*, 179 U. S. 305, 315.

Whilst in the absence of authority the foregoing consideration suffice to dispose of the case, it is also effectually concluded by authority. *Bein v. Heath*, 12 How. 168. In that case, as in this, it was insisted that the local law should have been applied in construing and enforcing an injunction bond given in a court of the United States. But the Court, in negating the contention, speaking through Mr. Chief Justice Taney, said (p. 178):

'Now there is manifest error in subjecting the parties to an injunction bond, given in a proceeding in equity in a court of the United States, to the laws of the state. The proceeding in a Circuit Court of the United States in

equity is regulated by the laws of Congress, and the rules of this Court made under the authority of an Act of Congress. And the ninetieth rule declares that, when not otherwise directed, the practice of the High Court of Chancery in England shall be followed. The eighth rule authorizes the Circuit Court, both judges concurring, to modify the process and practice in their respective districts. But this applies only to forms of proceeding and mode of practice, and certainly would not authorize the adoption of the Louisiana law, defining the rights and obligations of parties to an injunction bond. Nor do we suppose any such rule has been adopted by the Court. And if it had, it is unauthorized by law, and cannot regulate the rights or obligations of the parties.

And when an injunction is applied for in the Circuit Court of the United States sitting in Louisiana, the court may grant it or not, according to the established principles of equity, and not according to the laws and practice of the state in which there is no court of chancery as contra-distinguished from a court of common law. And they require a bond, or not, from the complainant, with sureties, before the injunction issues, as the court, in the exercise of a sound discretion, may deem it proper for the purpose of justice. And if, in the judgment of the court, the principles of equity require that a bond should be given, it prescribes the penalty and the condition also. And the condition prescribed by the court in this case, but which was not followed, is the one usually directed by the court.

In proceeding upon such a bond, the court would have no authority to apply to it the legislative provisions of the state.'

Indeed, the principles announced in *Bein v. Heath* were in effect but the reiteration of the doctrine previously established by this Court, that a bond given in pursuance of a law of the United States was governed, as to its construction, not by the local law of a particular state, but by the principles of law as determined by this Court, and operative throughout the courts of the United States.

Cox v. U. S., 6 Pet. 172.

Duncan's Heirs v. U. S., 7 Pet. 435."

By analogy, does not this decision of this Court settle this controversy adversely to the Mill Company, and adversely to its attorneys, who are the *real* parties in interest herein? We insist that the proceedings in this Court were original, instituted by the Railway Company against the Mill Company to set aside the judgment of the State Court in favor of the Mill Company against the Railway Company, authorized and permitted only by the Judiciary Act of Congress; that the Mill Company was the defendant in that proceeding.

In the case of *Knox v. Knox*, 12 N. H. 352, 358, it was said that:

"The purpose and effect of the review are different where the writ of review is instituted by the plaintiff in the original action, who has failed to sustain his suit, from its object and operation when it is brought by a defendant against whom the original plaintiff has obtained judgment. In the first instance it is in effect a continuation of the original suit, the plaintiff in review still seeking to recover the debt or damages for which he originally commenced his action. In the other, although the review rises out of and is dependent upon the original suit, * * * it is in effect a new action."

A writ of error is a new suit, and hence falls within a statute of limitations limiting the time within which actions may be brought.

Schroeder v. Merchants, 104 Ill. 171.
Bank v. Jenkins, 107 Ill. 291.

The case of *State of Kansas v. Thomas*, 76 Kan. 447, 450, was a proceeding in the District Court to enjoin a nuisance, under the Prohibitory law of the state.

"Upon conviction the cases were appealed to this Court, where the judgments were affirmed. Subsequently

counsel for the state moved for an allowance for attorneys' fees in this Court. The same question is, therefore, involved in all of the cases, which is: whether the statute authorizes the allowance of an attorney's fee in such cases in this Court. Sec. 1 of Chapter 338, Laws of 1903, reads as follows:

'In case judgment is rendered in favor of the plaintiff in any action brought under the provisions of this section, the court rendering the same shall also render judgment for a reasonable attorney's fee in such action in favor of the plaintiff and against the defendants therein, which attorney's fee shall be taxed and collected as other costs therein, and when collected paid to the attorney or attorneys of the plaintiff therein.'

A similar question arose in *West v. Lumber Co.*, 56 Kan. 287, 43 Pac. 239, which was whether an attorney's fee in this Court could be allowed in a suit brought by an artisan or day laborer to foreclose a mechanic's lien. The statute construed at that time was Section 638 of the Code of Civil Procedure, which reads as follows:

'In any action brought by any artisan or day laborer to enforce any lien under this Act, where judgment be rendered for plaintiff, the plaintiff shall be entitled to recover a reasonable attorney's fee, to be fixed by the court, which shall be taxed as costs in the action.' (Gen. Stat. 1901, Sec. 5125.)

It was held that the provision applied only to the trial court, and did not authorize an allowance for attorneys' fees in this Court. The fact that this section of the statute was subsequently, in *Atkinson v. Woodmansee*, 68 Kan. 71, 74 Pac. 640, L. R. A. 325, held to be unconstitutional because it denied persons within the jurisdiction of the state equal protection of the law, does not, we think, destroy the force of the former decision as a precedent. The language of the section allowing an attorney's fee in a suit brought by an artisan or day laborer to enforce a mechanic's lien is in all respects similar to that used in the statute under consideration. Each statute provides that where judgment is rendered in favor of plaintiff in an action brought under its provisions an attorney's fee shall be allowed, which shall be taxed as costs in the action. The question is not discussed in *West v. Lumber*

Co., supra. The opinion merely declares that Section 638 of the Code does not apply to this Court.

The same question was before the Court in *K. P. Ry. Co. v. Wood*, 24 Kan. 619, which was an action to recover damages for stock killed by the railway company. The Act of 1874, under which the action was brought, provided that the owner might recover the full value of the animal killed, together with a reasonable attorney's fee for the prosecution of the suit, and also that it should be the duty of the court or jury, where the judgment or verdict was in favor of plaintiff, to make a finding of the amount allowed for an attorney's fee. A motion was filed by defendant in error asking the Court to tax against the railway company a fee for services in this Court. In the opinion it was said:

'On a motion so filed therefor defendant in error asks us to tax against the railroad company an additional amount, as fees of counsel in this Court. This motion will be overruled. The statute gives no attorney's fee for defending actions, and no new judgment is recovered in this Court.' (P. 626.)

The jurisdiction of the Supreme Court in actions of this kind is purely appellate. The only judgment it can render is to affirm, modify or reverse the judgment rendered in the court below. It is not a judgment rendered in favor of plaintiff in the language of the statute, but one which merely affirms, modifies or reverses the judgment which was rendered below in favor of plaintiff in the action. The appellant in each case was convicted of a contempt of the District Court, not of a contempt of this Court. And this Court has no power to render any judgment in actions of this kind, except the kind of a judgment it must always render on proceedings brought here on appeal or error.

Counsel for the state urge that the provision for the allowance of attorneys' fees in actions of this character was adopted by our legislature from the law of Iowa, and with it there was adopted the construction placed upon the statute by the decision of the Iowa Supreme Court, and we have been cited to a number of Iowa cases holding that the statute there authorizes the allowance of attorneys' fees in the Supreme Court. We recognize the force of the rule that where one state adopts the statute

of another, it adopts the definite, known construction placéd thereon by the courts of the other state, but we have held the rule to be subject to the exception that where such construction is contrary to the weight of reason or authority, or is against the general policy of our laws, the construction will not be followed. (*The State v. Campbell*, 73 Kan. 688, 85 Pac. 784, L. R. A. n. s. 533.) Prior to the enactment of this statute, the rule was announced by Mr. Justice Brewer in *K. P. Ry Co. v. Wood*, *supra*, that a similar statute would not authorize the allowance of fees in this Court."

Here it will be seen the Supreme Court (through Mr. Justice Porter) decided that the statute only applied to the trial in the District Court, and did not apply to a trial in the Supreme Court, on an appeal by the defendant in the court below, following the decision of Mr. Justice Brewer in the case of *K. P. Ry. Co. v. Wood*, 24 Kan. 619, in which he said (p. 626) :

"The statute gives no attorney's fee for *defending* actions, and no new judgment is recovered in this Court."

In view of the foregoing decisions, and many others of like character, if the State Court had jurisdiction and power to assess any damages which accrued after the final judgment of that court, and as a result of the proceedings in error instituted in this Court, did the State Court have any power to assess any damage not based upon or contemplated by the Judiciary Act of Congress, under and by virtue of which the proceeding in error was prosecuted? If the writ of error and supersedeas suspended the jurisdiction of the State Court, did it not also suspend the operation of Section 5193, General Statutes of Kansas, 1901, while such proceeding in error was pending in this Court? After the proceedings in error were perfected, and this Court acquired exclusive jurisdiction of the

controversy, did Section 5641, General Statutes of Kansas, 1901, remain effective and operative as to the parties to the litigation? In assessing damages to the Mill Comapny which accrued after the supersedeas, the State Court not only ignored the Judiciary Act, but affirmatively held that "the Judiciary Act was not intended to affect, and does not affect, the jurisdiction of the" State Court, and that "the damages in *mandamus* proceedings comprehended by Section 723 of the Code (being Sec. 5641, Genl. Stat. 1901) are the injuries sustained as the natural and probable consequence of the *wrongful* refusal to comply and the expense reasonably and necessarily incurred in compelling compliance with the *alternative writ*, including reasonable attorneys' fees in this Court and in the Supreme Court of the United States." (85 Kan. 215.)

THIRD.

The Supreme Court of Kansas erred in refusing to enter judgment in accordance with the mandate of this Court, and in refusing to give full force and effect to such mandate, and in entering a different judgment against the plaintiff in error than it was authorized by said mandate to enter, and, in so doing, disregarded the Constitution and laws of the United States.

The decision and judgment of the State Court was entered December 8th, 1906, awarding a peremptory *mandamus*. The court did not on said date render any judgment for damages (Rec., p. 100), but allowed the Mill Company ten days in which to file a claim for damages, which was done December

15th, 1906. (Rec., pp. 100-104.) The judgment of the State Court was affirmed by this Court (211 U. S. 616, 627), and the mandate of this Court was filed with the clerk of the State Court, and order of affirmance of the judgment of this Court duly entered. (Rec., p. 105.) This Court made no order allowing interest or damage by reason of the writ of error. It had the right and power to do it, under the Judiciary Act.

In the case of *Gibbs v. Diekma*, 131 U. S. appendix, C. L. XXXVI, it was held that:

"This Court has power to adjudge damages for delay on appeals as well as writs of error, *and this power is not confined to money judgments.*"

Whitney v. Cook, 131 U. S. Appendix, CXCVII.

"And if, upon affirmance, no allowance of interest or damages is made, it is equivalent to a denial of any interest or damage; and the Circuit Court, in carrying into effect the decree of affirmance, cannot enlarge the amount thereby decreed, but is limited to the *mere* execution of the decree in the terms in which it is expressed."

In re Washington, 140 U. S. 96-97.

Bank v. Aetna Ins. Co., 76 Fed. Rep. 550.

Tyler v. Maguire, 17 Wal. 253.

Gaines v. Rugg, 148 U. S. 228.

In re Sanford, etc., 160 U. S. 247.

In re Potts, 166 U. S. 263. ..

In re Blake, 175 U. S. 114-115.

However, the State Court, on entering the mandate of this Court, permitted the Mill Company to file an "amended statement and claim of damages" (Rec., p. 105), setting up and claiming upwards of \$80,000 in damages which it "sustained by reason of the *unlawful* act of the defendant in refusing to perform switching service" for the Mill Company, while the controversy was pending in this Court on writ of

error, and which alleged damages included over \$75,000 fees and expenses in this Court (Rec., pp. 106-108); and the State Court entertained the claim, and made the allowance of damage, based solely upon the wording of Section 5193, General Statutes, 1901, to the effect that: "If judgment be given for the plaintiff, he shall recover the damages which he *shall have* sustained, etc."

In this connection, attention of the Court is specifically called to the alternative writ of mandamus. (Rec., p. 93.) It will be observed that there is no charge of discrimination against the Mill Company. Construing Section 5193, General Statutes, 1901 (relating to mandamus), in the case of *State v. County*, 11 Kan. 69, the Supreme Court of Kansas said that:

"Issues are now made up by the writ and the return. A trial may be had on such issues, and judgment rendered for the plaintiff or for the defendant, the same as in any other civil action; and the action is now considered almost as much an action of right as any other civil action."

And in the case of *Crans v. Francis*, 24 Kan. 754, it was said by the Court that:

"No other pleadings are allowed than the writ and answer. These pleadings are to be construed and to have the same effect as pleadings in a civil action, and the issues are to be tried and further proceedings had as in a civil action."

In the case of *Brenner v. Bigelow*, 8 Kan. 497, it was said:

"Every finding of fact by the court not founded upon any issue made by the pleadings is a nullity. The court cannot go outside of the issues to make findings."

Again, in the case of *Brookover v. Esterly*, 12 Kan. 152, 153, it was said:

*"Issues in a case are always made up by the pleadings, * * * and the findings in a case, whether by the court, jury or referee, must always be founded upon the issues. * * * Every finding of fact by the court not founded upon the issues made by the pleadings is a nullity," etc.*

Again, in the case of *Newby v. Myers*, 44 Kan. 477, it was said:

"The findings of fact of a trial court must be upon the issue as it was made in the pleadings, and every finding of fact not founded upon any issue is a nullity."

In the case of *Newby v. Myers*, 44 Kan. 479, it was said:

"Findings of fact of a trial court must be upon the issue or issues made in the pleadings. Findings of fact which are not in issue by the pleadings may be wholly disregarded, and treated as immaterial."

In the case of *Gille v. Emmons*, 58 Kan. 118, it was said:

"A judgment entirely outside the issues in the case, and upon a matter not submitted to the court for its determination, is a nullity."

And the Supreme Court of Kansas quotes with approval the decision of this Court in the case of *Reynolds v. Stockton*, 140 U. S. 254, where it was held that, in order to give a judgment rendered by even a court of general jurisdiction the merit and finality of an adjudication between the parties, it must be responsive to the issues tendered by the pleadings. In that case the Court further said:

"A judgment rendered upon another and different cause of action than that stated in the complaint or submitted to the court for its decision is without binding force."

The judgment of the State Court, of date December 8th, 1906, was based upon the issues made by the alternative writ and the answer thereto, and in that judgment was merged all of the issues which were or might have been litigated by the pleadings then before the Court. That judgment was affirmed by this Court, and the State Court has no power, on receipt of the mandate of this Court, to make a new issue by an "amended statement and claim for damages" * * * necessarily sustained by reason of the unlawful act of the defendant in refusing to perform "switching service" for the Mill Company (Rec., p. 106), and under the guise of which award to the Mill Company, and to its attorneys, damages for expenses incurred and attorneys' fees in *defending* the proceedings in error in this Court.

We insist that the action of the court below was without authority, and should be set aside as absolutely void. It was nothing short of usurpation. All this was urged upon the State Court. In the brief presented to that court it was said:

"The Supreme Court, in *Gepan v. Stephenson*, 18 Kan. 146, construed the words 'shall have been,' as contained in a statute, and held that the words 'shall have been' belong to the indicative, and not to the potential mood. 'They refer to the actual, and not to the possible or permissible.'

The Court is now asked to ignore this statute, and render judgment, not for the damages which the Mill Company 'shall have sustained' at the date of the judgment, but damages sustained subsequent to that date. By the proceedings in error, the judgment was not vacated, but its enforcement merely suspended, and for the damages, if any were sustained, after the date of the judgment, the supersedeas bond was an absolute substitute under the statute. The damages, if any, accrued under different rights. The damages allowed up to the date of the judgment are statutory damages for failure to perform a duty enjoined by law. After the date of the

judgment, the damages, if any, are based upon the obligations of the bond, and are not based upon the statute, nor do they accrue as a result of any statutory requirement.

As said by the Supreme Court of the United States: "The bond and security on the writ cannot be regarded as an idle ceremony. It was designed as an indemnity to the defendant in error should the plaintiff fail to prosecute with effect his writ of error."

The legislature never had in contemplation the damages claimed to have accrued after the rendition of the judgment on December 8th, 1906. By the plain letter of the statute, it only had in contemplation the damages which the plaintiff 'shall have sustained' at the date of the rendition of the judgment.

It is well settled—indeed, it is fundamental—that a court will not, by construction, enlarge the scope of a statute or extend its operation beyond the plain intention of the legislature.

In *Shawnee Co. v. Carter*, 2 Kan. 116, it was said that:

"The rule that: "If an affirmative statute direct anything to be done in a certain manner, that thing shall not, other manner," is a rule established on well considered even though there are no negative words, be done in any principles."

In *Prouty v. Stover*, 11 Kan. 235, it was said that:

"A statute prescribes a rule of action for the future, and whatever comes within the limits of that rule must be controlled by it, although it may be an act not thought of, or even impossible, at the time of the passage of the law."

In *Shattuck v. Chandler*, 40 Kan. 520, it was said that:

"The rule is that where a form of procedure is provided by statute, and the manner of doing a particular thing or not is pointed out, it precludes the doing of it in any other manner or form."

In the case of *State v. Bancroft*, 22 Kan. 170, it was said:

"The cardinal canon of construction, to which all mere rules of interpretation are subordinate, is that the intent, when ascertained, governs."

In the case of *Ayers v. Commissioners*, 37 Kan. 240, it was said:

'Where the statute is plain and unambiguous, there is no room left for a judicial construction so as to change the language employed therein.'

By the observance of these plain and salutary rules of construction, how can the court consider any evidence of any kind of damage claimed to have accrued subsequent to the date of the final judgment? At a very early date this court (1 Kan. 273) laid down the law to be that: 'The will of the Legislatures, expressed in the statute, is the law,' and that will is 'to be ascertained by all legitimate methods of interpretation.' The damages allowed under the statute are such damages as accrue from neglect to perform a duty enjoined by law. The damages which accrued after the judgment, and when proceedings in error are invoked, are such as accrued from the failure to 'prosecute the writ or appeal to effect.' The damages in the first class are prescribed and provided for by the Statute of Kansas. The damages in the second class are prescribed and provided for by the Federal Constitution. The Statutes of Kansas make no provision for the ascertainment of the damages, under the Federal Statute, in this proceeding, but the plaintiff may (64 Kan. 283) in this 'proceeding, and as a part of his remedy, recover such damages as he has actually sustained through the wrongdoing of the defendant.' Unmistakably this applies to the damages which he shall have sustained up to and at the date of the rendition of the final judgment.

The final judgment awarding peremptory writ of mandamus was entered December 8th, 1906. The record will show that, by order of the court, the hearing as to the damages which the Mill Company 'shall have sustained' was continued, pending the proceedings in error instituted in the Supreme Court of the United States, and a *superseas* bond was given, as provided by the United States Statute. After the judgment of this court was affirmed by the Supreme Court of the United States, an amended claim for damages was filed, setting up damages, expenses and attorneys' fees, etc., which accrued subsequent to the final judgment of this court December 8th, 1906. The very large per cent of the damages allowed by the Commissioner accrued after December 8th, 1906, and after the

judgment of this court was superseded by proper undertaking.

The proceedings in error from the Supreme Court of the United States to review the judgment of this court did not vacate the judgment of this court of December 8th, 1906. It only suspended its operation pending such proceedings. The question is, therefore, squarely presented: Has this court jurisdiction to render any different judgment than that it might have entered on December 8th, 1906? Has the court any jurisdiction to do more than allow such damages as it might have allowed if it had proceeded forthwith to assess the damages at the time it rendered the final judgment awarding the peremptory mandamus? We contend not. The wrongdoing of the defendant was ascertained and merged in the final judgment December 8th, 1906.

In the case of *Price v. Bank*, 62 Kan. 735, it was held that:

'All causes of action upon which suit is brought and judgment obtained are merged in the final judgment, and are thereby extinguished, and cannot be made the foundation of a subsequent action or judgment.'

That judgment carried with it the statutory right of the Mill Company to 'recover the damages which it shall have sustained' up to that date by reason of the wrongdoing of the defendant, which had been judicially determined by the court; not the damages which it might thereafter sustain as a result of a disobedience of the judgment and mandate of the court, but the damages it had sustained by reason of the refusal of the defendant to perform a duty enjoined upon it by law prior to the rendition of the final judgment. We are not contending that the court did not have the power to render the judgment awarding the writ, and postpone to another date the hearing as to the damages which the Mill Company 'shall have sustained' at the date when the judgment was rendered. But suppose the court, on December 8th, 1906, had proceeded forthwith to ascertain the damage, and had found the amount of damage, and had made such finding a part of the judgment, and thereafter the judgment had been superseded and affirmed, as in this case, would the court have the power, in a supplementary proceeding, or otherwise, to open upon the former judgment, and enlarge the

amount of damages resulting from the delay by reason of the proceedings in error?

What does this court mean where it says, in *McClure v. Scates*, 64 Kan. 283, that:

'Where a judgment is rendered in favor of the plaintiff in a mandamus proceeding he may, in the same proceeding, and as a part of his remedy, recover such damages as he has actually sustained through the wrongdoing of the defendants.'

In the 'same proceeding,' and as 'a part of his remedy,' etc., must have some significance. The court refers to a 'mandamus proceeding,' and, as a part of that 'proceeding,' and as a part of his remedy, the plaintiff may 'recover such damages as he has actually sustained through the wrongdoing of the defendant.' What 'wrongdoing' has the defendant been guilty of, so far as the Mill Company is concerned, since December 8th, 1906? It had a lawful right to institute proceedings in error in the Supreme Court of the United States. This right is guaranteed by the Constitution of the United States. It had a lawful right to suspend the operation of the judgment of date December 8th, 1906, by giving a proper bond. (See Fed. Judiciary Act, U. S. Compil. St. 1901, Vol. 1, Sec. 1000.) The amount of the bond was prescribed by the Chief Justice of this Court, and by him approved. All of these proceedings were taken and had in strict compliance with and conformity to the legal rights of the defendant. In thus delaying the enforcement of the judgment of this court, wherein was defendant guilty of any 'wrongdoing'? It violated no law. It neglected no duty to the Mill Company enjoined upon it, either by law or the judgment of this court. It was its duty to obey the mandate of this court, unless the judgment of this court was superseded as provided by law. What was the 'wrong' committed by the defendant which gave the Mill Company the right of action to demand 'damages'? It was neglect to perform a duty enjoined by law which resulted in damage. It was 'an entire claim arising from a single wrong.'

In the case of *R. R. Co. v. Beebe*, 39 Kan. 465, it was held that:

'An entire claim arising from a single wrong cannot be divided and made the subject of several suits, however numerous the items of damages may be; a judgment upon

the merits of any part will be available as a bar in other actions arising from the same cause.'

It was further held in that case that:

'We believe the law to be well settled that no party is permitted to split his causes of action into different suits. If he does, and obtains judgment upon any part, such judgment is a complete bar to a recovery upon any remaining portion hereof. The splitting up of claims is not permitted in case of contracts, and the same rule which prevents a party from doing so applies with equal force to actions arising in tort, and the same act cannot be the foundation for another suit, although the items of damages may be different.' "

Madden v. Smith, 28 Kan. 801.

Coal Co. v. Brick Co., 52 Kan. 748-9.

Wisler v. Miller, 53 Kan. 515.

Price v. Bank, 62 Kan. 735.

FOURTH.

The said Supreme Court of Kansas erred in holding and deciding that the Act of Congress entitled "An Act to protect Trade and Commerce Against Unlawful Restraint and Monopolies," did not preclude the Mill Company from recovering herein, although a member of such unlawful combination.

The Missouri Pacific Railway Company, on February 8, 1911, filed its exceptions to the report of the Commissioner (Rec., p. 47), which contained, among other exceptions, the following (Rec., p. 51):

"The evidence demonstrates that the Mill Company, during all the time covered by this controversy (September 1st, 1906, to April 1st, 1907), and several years before and subsequent, was a member of and an active participant in a combination of millers in southern Kansas, Oklahoma and Texas, that had for its purpose and object the control, restraint and monopoly of the price of wheat, corn and flour. All of the grain purchased by the Mill Company—all of the flour produced at its mill—and shipped out was purchased, handled and sold in subordination to such combination and trust. Every item of damage allowed by the Commissioner connected with the operation of said mill is tainted with the prices fixed, and surrounded with the limitations and restrictions of the combination and trust to which the Mill Company was a party. The amount allowed by the Commissioner as items or elements of damage is and must be, if sustained by this court, a reward and premium for a conceded, unblushing and notorious violation of the Anti-Trust Laws of Kansas, and the Acts of Congress prohibiting such violation; and the conclusion of the Commissioner is not supported by the evidence, and is contrary to law, and the facts appearing to the court, the whole proceeding should be dismissed."

The Supreme Court of Kansas adopted a rule relative to the printing of abstracts of the record. (See Section 617, Genl. Stat. Kansas 1909.) These rules and the Code of Civil Procedure were construed by the Supreme Court of Kansas in the case of *Ry. Co. v. Conlon*, 77 Kan. 324. In that case, among other things it was held that:

"Causes are no longer to be determined in this court upon the records, but upon abstracts prepared in accordance with the provisions of Rule 10a."

In pursuance of this rule and decision of the Supreme Court, the Missouri Pacific Railway Company abstracted all the evidence in this case, and the abstract was filed with the Commissioner, and is contained in full in the transcript. (Rec.,

pp. 91-194.) When the report of the Commissioner was made, and the controversy came on for hearing before the Supreme Court of the state, the Missouri Pacific Company filed a brief and supplemental abstract of the evidence. (Rec., pp. 196-267.) The correctness of these abstracts has never been challenged by the defendants in error or their counsel.

The record discloses the fact that there was a very full abstract of evidence proving and tending to prove that said plaintiffs, from August 1, 1906, to April 1, 1907, and long prior and subsequent thereto, were members of and belonged to a combination and association, in violation of the Act of the State of Kansas "defining and prohibiting trusts, providing procedure to enforce the provisions of this Act, and providing penalties for violations of the provisions of this Act," being Chapter 113-a, General Statutes Kansas 1901, and Sections 2427-2443, Chapter 31, Article 13, General Statutes Kansas 1901; and in violation of the Sherman Anti-Trust Act of Congress. (Rec., pp. 166-194.)

The Commissioner, in his report, relative to the evidence which was introduced sustaining the contention of the Missouri Pacific Railway Company that the Mill Company belonged to and was a member of an association and combination, in violation of the Sherman Anti-Trust Act, found, among other things, that (Rec., p. 41) :

"I find that the Pacific Company's abstract of the evidence applicable to this question is a fair and full one, and it is adopted as the Commissioner's analysis of the evidence."

In the abstract thus found by the Commissioner to be correct, and adopted as the Commissioner's analysis of the evidence, will be found the following statement (Rec., pp. 193-194) :

"The evidence of F. D. Larabee, F. S. Larabee and F. D. Stevens, and the minutes of the proceedings of the Southern Kansas Millers' Commercial Club and of the Oklahoma and Texas Millers' Association, and the correspondence passing between the officers of the several associations and the several millers, conclusively establishes the fact that, prior to August 1st, 1906, and down to January 1st, 1909, and since said date, the Larabee Flour Mills Company, and each member thereof, belonged to an organization of which the said F. D. Stevens was manager, for the purpose of creating and carrying out restrictions in trade and commerce, and aids to commerce, and to carry out restrictions in the value and free pursuit of the business of buying and selling grain, and the manufacture and sale of flour and meal by the members thereof and belonging to such association, and for the purpose of increasing and reducing the price of merchandise, produce and commodities, and to prevent competition in the manufacture, making, transfer, sale and purchase of flour, wheat, grain and the products thereof, and to fix a standard, or figure, whereby the price to the public of wheat, grain, flour and the products thereof should be controlled and established, and that they had entered into and belonged to a combination, as such partners, and the Larabee Flour Mills Company, under a contract and agreement, express or implied, by which they bound themselves not to sell, manufacture, dispose of or transport any wheat, meal, grain or flour, or the products thereof, below a common, standard figure, and to preclude a free and unrestricted competition among themselves and others in the transfer, sale and manufacture of wheat, grain, flour and meal, in violation of the laws of the State of Kansas. And further shows and establishes the fact that the said Southern Kansas Millers' Commercial Club, of which the said Larabee Flour Mills Company was a member, and F. D. Stevens, their agent and authorized officer, was its manager, had entered into a combination and conspiracy between the Oklahoma Millers' Association and the Texas Millers' Association, and the members thereof, in violation of the Sherman Anti-Trust Act, and for the purpose of fixing a standard of prices for wheat, flour and meal, and the products thereof, manufactured by the millers in such association. And such evidence further establishes the fact that the

said Larabee Flour Mills Company operated its said mill at Stafford, Kansas, during the time covered by the subject matter of this controversy, from August 1st, 1906, to July 1st, 1907, and since said date, in combination with the millers in southern Kansas, for the purpose and with the intent, and under an agreement and understanding, that they would carry out restrictions in the purchase and manufacture of wheat, grain, flour and meal, and the products thereof, and would monopolize the business and prevent competition—all in violation of the laws of the State of Kansas, and of the Acts of Congress in such cases made and provided."

The Commissioner, however, found as a fact that the Southern Kansas Millers' Commercial Club was not an organization in violation of the Anti-Trust Laws of the State of Kansas. (Rec., p. 41.)

The Supreme Court of Kansas, in passing upon this question, among other things said (Rec., p. 269) :

"The defendant claimed that plaintiff was not entitled to recover any damages because during the time the damages arose plaintiff was a member of an organization in violation of the Anti-Trust Laws. Held, that the plaintiff was entitled to recover whatever damages it sustained by the wrongful suspension of the transfer service, unless the service sought to be enforced by the mandamus was a necessary part of the purposes of such unlawful trust or combination."

And further said, referring to the contention of the Railway Company that the Mill Company was a member of the Southern Kansas Commercial Club, that (Rec., pp. 275-276) :

"A large amount of evidence was taken which tended strongly to prove this charge, although it was not sufficient to satisfy the Commissioner that it had been established. It becomes unnecessary for us to weigh the evidence, because of a further finding of the Commissioner,

which appears to be supported by the evidence, that the performance of the switching service, which was the subject matter of this action, was no part of the purpose of the organization of the Southern Kansas Millers' Commercial Club, and in no sense a part of or necessary to the carrying out of any of the purposes for which the club was organized. Under the authority of *Barton v. Mulvane*, 59 Kan. 317, the plaintiff is entitled to recover whatever damages it has sustained by the wrongful suspension of the transfer service, unless the service sought to be enforced was a necessary part of the purposes of some unlawful trust or combination, and unless some violation of the trust law entered into was a part of the cause of action in the original proceeding. To the same effect are:

Bement v. Natl. Harrow Co., 186 U. S. 70.

Connolly v. Union Sewer Pipe Co., 184 U. S. 540.

Loeb v. Columbia Twp. Trustees, 179 U. S. 472, 479.

Embrey v. Jemison, 131 U. S. 336, 348.

Natl. Distilling Co. v. Cream City Importing Co., 86 Wis. 352-355."

We now ask the Court to review the conclusions of the State Court in which it declined to hold that, if it was established that the Mill Company were members of an association, during the period covered by this controversy, which had for its purpose the violation of the Sherman Anti-Trust Act, it could not recover any damages from the Railway Company for an interruption of the unlawful business in which the Mill Company was engaged.

In the case of *K. C. So. Ry. Co. v. Albers Comm. Co.*, 223 U. S. 573, it was said:

"While it is true that, upon a writ of error to a State Court, we cannot review its decision upon pure questions of fact, but only upon questions of law bearing upon the Federal right set up by the unsuccessful party, it is equally true that we may examine the entire record, including the evidence, if properly incorporated therein, to determine whether what purports to be a finding upon ques-

tions of fact is so involved with and dependent upon such questions of law as to be in substance and effect a decision of the latter. That this is so is amply shown by our prior rulings. Thus, in *Mackay v. Dillon*, 4 How. 421, 447, where the State Courts had given to certain evidence an effect claimed to be unwarranted by an applicable law of Congress, it was held that their decision 'on the effect of such evidence may be fully considered here.' In *Dower v. Richards*, 151 U. S. 658, 667, where the conclusiveness of findings of fact by a State Court was elaborately considered, it was recognized that where the question is 'of the competency and legal effect of the evidence as bearing upon a question of Federal law, the decision may be reviewed by this court.' In *Stanley v. Schwalby*, 162 U. S. 255, 274, 277-279, which was an action of ejectment, the validity of an authority exercised under the United States was drawn in question, and depended upon whether the United States had a good title to the land in controversy. That question turned upon whether the attorney for the United States, who had represented it in the acquisition of the land, knew at the time of a prior deed to one McMillan, and the State Court found that he had such knowledge. In this court it was insisted, on the one hand, that the finding was conclusive, and, on the other, that the evidence was insufficient, as matter of law, to warrant the finding, and could be examined to determine whether this was so. In that connection this court, although recognizing the general rule that findings upon pure questions of fact are not open to review, said (p. 278): 'But so far as the judgment of the State Court against the validity of an authority set up by the defendants under the United States necessarily involves the decision of a question of law, it must be reviewed by this court, whether that question depends upon the Constitution, laws or treaties of the United States, or upon the local law, or upon principles of general jurisprudence.' And, upon examining the evidence, this court held it to be 'wholly insufficient, in fact and in law, to support the conclusion that the attorney had any notice of the previous deed to McMillan,' and accordingly reversed the judgment of the State Court."

It must be conceded that it is established beyond any question of doubt that the Larabee Flour Mill Company from

August 1, 1906, to July 1, 1907, and long prior and subsequent thereto, were members of the "Southern Kansas Millers' Commercial Club" with headquarters at Wichita. It must also be conceded that F. D. Stevens was the manager of such club and the authorized and paid agent of each member thereof, and that each member is bound by the acts, conduct, statements and representations of F. D. Stevens in and about the business in which he was employed. This is elementary law. In the case of *The State v. Winner*, 17 Kan. 298, it was held that:

"The acts and declarations of one co-conspirator in furtherance of the principal object and design of the conspiracy, may be shown in evidence against each of the conspirators."

And it was further said by the court that:

"Ordinarily when the acts and declarations of one co-conspirator are offered in evidence as against another co-conspirator, the conspiracy itself should first be established *prima facie*, and to the satisfaction of the judge of the court trying the cause; but this cannot be always required. It cannot well be required where the proof of the conspiracy depends upon a vast amount of circumstantial evidence—a vast number of isolated and independent facts. And in any case where such acts and declarations are introduced in evidence, and the whole of the evidence introduced on the trial, taken together, shows that such a conspiracy actually exists, it will be considered immaterial whether the conspiracy was established before, or after, the introduction of such acts and declarations."

The letters of the Larabees to their agent and manager, F. D. Stevens, prove the combination and conspiracy in violation of the Kansas Anti-Trust Act, and the letters and statements of Stevens (their agent and manager) in furtherance of his employment and the business for which he was employed, clearly demonstrate not only a violation of the Kansas Anti-

Trust Act, but the Sherman Anti-Trust Act. No one can read the evidence in this record without reaching the conclusion that the members of the Association were in a combination to control the prices of grain and the output of the mills, and to monopolize the business in which they were engaged, in the territory controlled by the association.

The by-laws, based upon the theory of "live and let live," are most significant. The terms and conditions upon which F. D. Stevens was employed and his duties irresistibly demonstrate the illegal purpose of the association. We assume, therefore, the grain and mill business, in which the Larabees were engaged and for interruption of which they claim damages, was an illegal business and conducted in violation of the laws of Kansas and of the United States. What, then, is their status in this litigation? Are they in a position to claim any damages? Is it the policy of the law to encourage its violation? Was it not the duty of the court, when these facts are made to appear, to stop and stay all proceedings instituted by or in the interest of such malefactors? Is there not coming up from the people everywhere, a demand, not only for free and fair competition in all the vocations of life, but that the laws enacted to secure that result shall be honestly and vigorously enforced?

It is provided by the laws of Kansas (Sections 7864, 7865, 7868 and 7870, General Statutes 1901) that:

"A trust is a combination of capital, skill, or acts, by two or more persons, firms, corporations, or associations of persons, or either two or more of them, for either, any or all of the following purposes:

First, to create or carry out restrictions in trade or commerce, or aids to commerce, or to carry out restrictions in the full and free pursuit of any business authorized or permitted by the laws of this state.

Second, to increase or reduce the price of merchandise, produce or commodities, or to control the cost or rates of insurance.

Third, to prevent competition in the manufacture, making, transportation, sale or purchase of merchandise, produce or commodities, or to prevent competition in aids to commerce.

Fourth, to fix any standard or figure, whereby its price to the public shall be, in any manner, controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, use or consumption in this state.

Fifth, to make or enter into, or execute or carry out, any contract, obligation or agreement of any kind or description by which they shall bind or have to bind themselves, nor to sell, manufacture, dispose of or transport any article or commodity, or article of trade, use, merchandise, commerce or consumption below a common standard figure; or by which they shall agree in any manner to keep the price of such article, commodity or transportation at a fixed or graded figure; or by which they shall in any manner establish or settle the price of any article or commodity or transportation between them or themselves and others, to preclude a free and unrestricted competition among themselves or others in transportation, sale or manufacture of any such article or commodity; or by which they shall agree to pool, combine or unite any interest they may have in connection with the manufacture, sale or transportation of any such article or commodity, that its price may in any manner be affected.

Any such combinations are hereby declared to be against public policy, unlawful and void."

"All persons, companies, or corporations within this state are hereby denied the right to form or to be in any manner interested, either directly or indirectly, as principal, agent, representative, consignee or otherwise, in any trust as defined in Section 1 of this Act."

"Every person, company or corporation within or without this state, their officers, agents, representatives or consignees, violating any of the provisions of this Act within this state, are hereby denied the right and are hereby prohibited from doing any business within this state, and all persons, companies and corporations, their officers, agents, representatives and consignees within this state, are hereby denied the right to handle the goods or in any manner deal with, directly or indirectly, any such

person, company or corporation, their officers, agents, representatives or consignees, and it shall be the duty of the Attorney General and the county attorney of any county in the state where any violation of this Act be committed or either of them to enforce the provisions of this section by injunction or other proceeding; and all persons, companies and corporations, their officers, agents, representatives or consignees, violating any of the provisions of this section either directly or indirectly, or of abetting or aiding either directly or indirectly in any violation of any provisions of this section, shall be deemed guilty of a misdemeanor and shall be fined not less than one hundred dollars nor more than one thousand dollars, and confined in jail not less than thirty days nor more than six months, and shall forfeit not less than one hundred dollars for each and every day such violation may continue, which may be recovered in the name of the State of Kansas in any court of competent jurisdiction."

"Any contract or agreement in violation of any of the provisions of this Act shall be absolutely void and not enforceable in any of the courts of this state; and when any civil action shall be commenced in any court of this state it shall be lawful to plead in the defense thereof that the plaintiff or any other person interested in the prosecution of the case is at the time or has within one year next preceding the date of the commencement of any such action been guilty, either as principal, agent, representative, or consignee, directly or indirectly, of a violation of any of the provisions of this Act, or that the cause of action grows out of any business transaction in violation of this Act."

It seems to us that the Supreme Court of Kansas in the opinion rendered on rehearing in the case of the *State v. Wilson*, 73 Kan. 343-359, has so far settled the question as to preclude the Larabees from any recovery herein, without a palpable violation of the Statute of Kansas as construed by the court in that case. In that case it was said (page 350) that "The statute forbids a member of a trust to do any business in promotion of, or in pursuance of the purposes of the trust." Every

bushel of grain purchased by the Larabees, and every pound of flour sold by them, was in violation of law, as much so as if their mill had been a brewery. In September, 1905, Stevens (Larabee's agent) wrote to Collett, Texas: "I assure you that you will have my best efforts in getting our mills (Larabees') to respect your flour prices in quoting flour in Texas." Again, on October 11, 1905, Stevens (Larabee's agent) writes to the same party, among other things: "Some of the Texas mills are bidding very high prices yet, but I hope that we will soon get them lined up. *We will be all right at this end*, and if you will advise me names of *all the mills cutting prices on flour*, *I will go after them.*" The assistant manager of the association, October 17, 1905, writes a letter in which he says: "This bureau of information will work in close connection with the other agencies, *establishing a maximum value on wheat each day*, and giving this *desired* information to all its members." The Larabees write to their agent, F. D. Stevens (December, 1906), that "the Claflin mill is the disturbing element." Again they write to their agent and manager of the association, F. D. Stevens: "We have decided the only thing for us to do to protect our trade *is to get right after the price cutters, and do it up brown.* * * * What we want is some assurance that those people will be good all the time, and, until we feel satisfied such is the case, *we are not going to be good ourselves.*"

What does all this mean? Innocent amusement? It means that these men were engaged in a violation of law for and on account of which they now ask judicial approval. In the case of *Mitchell v. Woods*, 17 Kan. 28, the court used language and asked some questions most pertinent here: "Is he entitled to recover for the loss of the fruits of such wrong? Is he entitled to recover for the loss of the prospective profits of his own intended wrong-doing? Is he entitled to be paid for his own intended wrong-doing? Can he found a right of recovery upon any such intended wrong-doing?" The Larabee business at

Stafford, by his own admission, was an illegal business—a business prohibited by positive law. They were members of a combination and conspiracy which, in its operations, was a curse to the farmers of Kansas. By their combination they deprived the farmer of the value of his wheat, which fair competition would have secured. F. D. Stevens (Larabees' agent and manager), in a letter to the Texas Millers' Association, says:

*"I regret to advise you that the Texas Star, and other Texas mills, have been buying wheat in our territory at from one to three cents above the prevailing prices. I am also advised by a number of our larger mills that unless the Texas mills respect local conditions in buying wheat in this territory, that they will retaliate with very low price on flour in Texas. * * * It has been suggested that, if all of the Southwestern mills would withdraw from the market for ten or fifteen days, that we would be able to accomplish some good."*

In November, 1906, Secretary for Oklahoma Topping writes F. D. Stevens (Larabees' agent and manager): "Our wheat prices are out of line for export, and the only solution for us is to curtail our output; shut down our mills to half time or more, if necessary." * * *

Is it possible that, in this enlightened age, and in the face of laws prohibiting such commercial outrages, the men engaged in this gigantic and indefensible conspiracy may flaunt their violation of law in the face of the court, and demand judicial approval by an award of damages for refusal to handle their contraband goods? The statute provides (Section 7868, General Statutes 1901) that "all persons, companies and corporations, their officers, agents, representatives and consignees within the state are hereby denied the right to handle the goods of, or in any manner deal with, directly or indirectly, such persons."

We think it will be conceded—certainly it cannot be successfully denied—that during the period covered by this controversy, long before, and since, there existed a combination and conspiracy between the Southern Kansas Millers' Commercial Club, the Oklahoma Millers' Association and the Texas Millers' Association "in restraint of trade or commerce among the several states," and to monopolize the trade and commerce among the states, in violation of the Sherman Anti-Trust Act, as well as the Kansas Anti-Trust Act. It is only necessary to refer to the correspondence between F. D. Stevens, E. K. Collett and C. V. Topping, managers and secretaries of the respective associations, to confirm the statement that there was such a combination and conspiracy. We have not only shown that the necessary effect of the combination and conspiracy was to prevent competition and restrain "trade and commerce," but that it, in fact, did accomplish that result. (Rec., pp. 166-193.)

In the case of *United States v. Trans-Mo. Freight Assn.*, 166 United States 291, the court said that:

"In order to-maintain this suit the Government is not obliged to show that the agreement in question was entered into for the purpose of restraining trade or commerce, if such restraint is its necessary effect."

The Larabees are claiming damages from the defendant Company because that Company neglected or refused to furnish cars with which to transport and ship an article of commerce that was manufactured and sold by the Larabees in violation of both state and national law.

In the case of *Coppell v. Hall*, 7 Wall., page 558, it was said that:

"The instruction given to the jury, that if the contract was illegal the illegality had been waived by the recon-

ventional demand of the defendants, was founded upon a misconception of the law. In such cases there can be no waiver. The defense is allowed, not for the sake of the defendants, but for the law itself. The principle is indispensable to the purity of its administration. It will not enforce what it has forbidden and denounced. The maxim, *ex dolo malo non oritur actio*, is limited by no such qualification. The proposition to the contrary strikes us as hardly worthy of serious refutation. *Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted with the vice of the original contract, and void for the same reasons. Wherever the contamination reaches, it destroys. The principle to be extracted from all the cases is that the law will not lend its support to a claim founded upon its violation.*"

In the case of *Hanauer v. Doane*, 12 Wall. 346-7, the court said:

"In the words of Chief Justice Eyre, in *Lightfoot v. Tenant*, 'the man who sells arsenic to one who he knows intends to poison his wife with it will not be allowed to maintain an action on his contract. The consideration of the contract, in itself good, is there tainted with turpitude, which destroys the whole merit of it. * * * No man ought to furnish another with the means of transgressing the law, knowing that he intended to make that use of them.' On this declaration Judge Story remarks: 'The wholesome morality and enlarged policy of this passage make it almost irresistible to the judgment; and, indeed, the reasoning seems positively unanswerable.' Can a man furnish another with the means of committing murder, or any abominable crime, knowing that the purchaser procures them and intends to use them for that purpose and then pretend that he is not a participator in the guilt? Can he wrap himself up in his own selfishness and heartless indifference and say, 'What business is that of mine? Am I the keeper of another man's conscience?' No one can hesitate to say that such a man voluntarily aids in

the perpetration of the offense, and, morally speaking, is almost, if not quite, as guilty as the principal offender."

Addyston Pipe & Co. v. United States, 175 U. S. 211.

Swift & Co. v. United States, 196 U. S. 375.

Smiley v. Kansas, 196 U. S. 447.

Loewe v. Lawlor, 208 U. S. 283-309.

The whole question was again considered by the court in the case of *Cont'l Wall Paper Co. v. Voight & Sons*, 212 U. S. 254-267, in which the court, among other things, said:

"Stated shortly, the present case is this: The plaintiff comes into court admitting that it is an illegal combination whose operations restrain and monopolize commerce and trade among the states and asks a judgment that will give effect, as far as it goes, to agreements that constituted that combination, and by means of which the combination proposes to accomplish forbidden ends. We hold that such a judgment cannot be granted without departing from the statutory rule, long established in the jurisprudence of both this country and England, that a court will not lend its aid, in any way, to a party seeking to realize the fruits of an agreement that appears to be tainted with illegality, although the result of applying that rule may sometimes be to shield one who has got something for which, as between man and man, he ought, perhaps, to pay, but for which he is unwilling to pay.

In such cases the aid of the court is denied, not for the benefit of the defendant, but because public policy demands that it should be denied without regard to the interests of individual parties. It is of no consequence that the present defendant company had knowledge of the alleged combination and its plans or was directly or indirectly a party thereto. Its interest must be put out of view altogether when it is sought to have the assistance of the court in accomplishing ends forbidden by law.

In *Hanauer v. Doane*, 12 Wall. 342, 349, this court said: 'The whole doctrine of avoiding contracts for illegality and immorality is founded on public policy. It is certainly contrary to public policy to give the aid of the courts to a vender who knew that his goods were pur-

chased, or to a lender who knew that his money was borrowed for the purpose of being employed in the commission of a criminal act, injurious to society or to any of its members.'

In *McMullen v. Hoffman*, 174 U. S. 639, 654, 669, where the authorities are reviewed and the whole subject carefully examined, the court said: 'The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way toward carrying out the terms of an illegal contract (citing many English and American cases). The court refuses to enforce such a contract, and it permits defendant to set up its illegality, not out of any regard for the defendant who set it up, but only on account of the public interest. It has often been stated in similar cases that the defense is a very dishonest one, and it lies ill in the mouth of the defendant to allege it, and it is only allowed for public considerations and in order the better to secure the public against dishonest transactions. To refuse to grant either party to an illegal contract judicial aid for the enforcement of his alleged rights under it tends strongly toward reducing the number of such transactions to a minimum. The more plainly parties understand that when they enter into contracts of this nature they place themselves outside the protection of the law, so far as that protection consists in aiding them to enforce such contracts, the less inclined will they be to enter into them. In that way the public secures the benefit of a rigid adherence to the law.' In that case the principle announced in *Coppell v. Hall*, 7 Wall. 542, 558, was reaffirmed, namely: 'Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted with the vice of the original contract, and void for the same reason. Wherever the contamination reaches, it destroys. The principle to be extracted from all the cases is that the law will not lend its support to a claim founded upon its violation.'"

In this case a peremptory writ of mandamus was awarded, and, under the statute, the question of damages to be awarded

the Larabees becomes a separate, independent issue, to be tried by the court, a jury or referee.

In the case of *Sheldon v. Pruessner*, 52 Kan. 589, it was said that:

"Perhaps it was not considered because the illegality of the transfer was not specially pleaded in either of the answers, but this was not necessary. The courts, in the due administration of justice, will not enforce a contract in violation of law, nor permit a plaintiff to recover upon a transaction against public policy, even if the invalidity of the contract or transaction be not specially pleaded."

Again the court said that:

"Whatever tends to interfere with the beneficial operation of the statute is unlawful, as against the policy of the law. Whatever tends to obstruct duty by defeating the letter or spirit of the law is also unlawful, and the courts will not enforce any agreement or contract for the benefit of one through whose direction or assistance the law is violated, or public policy contravened. The law attempts to close the doors to temptations by refusing such parties recognition in the courts. (37 Cent. L. J. 313.)

No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If, from the plaintiff's own statement or otherwise, the cause of action appears to rise *ex turpi causam* or the transgression of a positive law of this country, where the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because it will not lend its aid to such a plaintiff. (*Valentine v. Stewart*, 15 Cal. 389; *Wilcox v. Ellis*, 14 Kan. 588; *Gaston v. Drake*, 14 Nev. 175; *Drexler v. Tyrrell*, 15 *id.* 114.)"

The Supreme Court of the United States adopted the same principle in the case of *Oscanyan v. Arms Co.*, 103 U. S. 267; speaking of the duty of the court when the illegality of the transaction appears in any manner, said:

"Here the action is upon a contract which, according to the view of the judge who tried the case, was a corrupt one, forbidden by morality and public policy. We shall hereafter examine into the correctness of this view. Assuming for the present that it was a sound one, the objection to a recovery could not be obviated or waived by any system of pleading, or even by the express stipulation of the parties. It was one which the court itself was bound to raise in the interest of the due administration of justice. The court will not listen to claims founded upon services rendered in violation of common decency, public morality, or the law. History furnishes instances of robbery, arson and other crimes committed for hire. If, after receiving a pardon, or suffering the punishment imposed upon him, the culprit should sue the instigator of the crime for the promised reward—if we may suppose that audacity could go so far—the court would not hesitate a moment in dismissing his case and sending him from its presence, whatever might be the character of the defense. It would not be restrained by defects of pleading, nor, indeed, could it be by the defendant's waiver, if we may suppose that in such a matter it would be offered. What is so obvious in a case of such aggravated criminality as the one supposed, is equally true in all cases where the services for which compensation is claimed are forbidden by law, or condemned by public decency or morality."

When it is made to appear, as it conclusively appears in this proceeding, that the Larabees are seeking to recover damages for the interruption of an illegal business—a business prohibited by state and national laws, and by each made criminal, was it not the duty of the court, not for the sake of the defendant Railway Company, but out of respect for the law, to stop all proceedings, and refuse to give such transactions the encouragement of judicial approval?

FIFTH.

The said Supreme Court of Kansas was without any jurisdiction to render judgment against this defendant for any amount, and, in assuming to render such judgment, deprived this defendant of its property without due process of law, and denied to it the equal protection of the law.

At every stage of the proceedings before the Commissioner and before the court, the Railway Company not only challenged the jurisdiction of the court, but attempted to get a decision from the Commissioner and the court on the proposition that Section 5193, General Statutes 1901, as construed by that court in *McClure v. Scates*, 64 Kan. 284, was unconstitutional, and denied to the defendant the equal protection of the law.

Every objection made before the Commissioner involved the question (Rec., pp. 127-128), and the proposition that the statute (Sec. 5193, Genl. Stat. 1901), as construed by the State Court, was void, and in violation of the Constitution of the United States, was urged before the Commissioner, who refused, or who at least neglected to pass upon the question. When his report was filed with the court, the Railway Company filed exceptions to it (Rec., p. 47), among others (Rec., p. 49), that:

"Under Section 723 of Chapter 182, Laws 1909, as construed by this court in the case of *McClure v. Scates*, 64 Kan. 284, the allowance of an attorney's fee to the Mill Company, as an item or element of damage, is in violation of the Constitution of the United States, and denies to this defendant the equal protection of the law, and deprives this defendant of its property without due process of law. That Section 723, as heretofore construed by this court, is unconstitutional and void; that the Commissioner has found and determined that the mandamus proceedings was instituted to enforce a private right, and not a statutory duty, but only a self-imposed duty on the part of the

defendant; and there is no claim made or evidence offered proving, or tending to prove, such malice or fraud on the part of the defendant which would entitle the Mill Company to recover exemplary or punitive damage."

And this exception and objection was simply ignored by the State Court, although many pages of brief, as shown by the record, were consumed in presenting the question. In the petition for a rehearing (Rec., pp. 283-284) it was said that:

"Section 723 of Chapter 182, Laws 1909, page 462, as construed by this court in *McClure v. Scates*, 64 Kan. 284, deprives the defendant of its property without due process of law, and denies to it the equal protection of the law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

This question was presented in the defendant's brief, and some twenty pages devoted to its discussion. It was presented in oral argument, and urged in the utmost good faith. In the opinion filed there is not one word on the subject. The statute of this state provides (Sec. 592, Chap. 182, Laws of 1909, p. 436) that:

'It shall be the duty of the judges of the Supreme Court to prepare and file with the papers in each case full notes of the opinion of the court upon the questions of law arising in the case, etc.'

The constitutionality of Section 723, Chapter 182, Laws of 1909, was a 'question of law arising in the case.' It was raised before the Commissioner, and presented wherever proper. The transcript of the case is full of objections, upon the ground and for the reason that the law referred to, as construed by this court, was unconstitutional and void, and in conflict with the Fourteenth Amendment to the Constitution of the United States. The same question was presented in printed brief, in as proper and dignified a manner as possible. Our contention was supported not only by former decisions of this court (68 Kan. 71), but by decisions of other State Courts and the Supreme Court of the United States.

Gulf, Colo. & S. F. Ry. Co. v. Ellis, 165 U. S. 150.

The question was one of law, properly and necessarily 'arising in the case,' and it was made the duty of this court to 'file full notes of the opinion of the court upon questions of law arising in the case.'

Independent of what that opinion might be, the defendant was entitled, as of right, to have the opinion of the court upon that question. It was one of the important, if not the most important, questions in the case. The defendant believed, and still believes, that the presentation of the ridiculous demand for attorneys' fees was the result of a conspiracy between the Larabees and their attorneys to judicially plunder its treasury. The proceedings before the Commissioner give color to the belief.

In the case of *Atkinson v. Woodmansee*, 68 Kan. 71, this court had decided that a statute allowing to a plaintiff attorneys' fees, and none to the defendant, denied to the defendant the equal protection of the law, and was unconstitutional and void. It was a precedent which the defendant had the right to invoke to protect itself from a threatened outrage—the result of the influence of the distinguished gentlemen who were seeking to reap a rich harvest where they had not sown.

In presenting and urging the unconstitutionality of the Act under which attorneys' fees were claimed, defendant was within its legal rights. It had a right to expect a decision of this Honorable Court upon that question. The question was briefed at length and argued, but the opinion of the court does not even refer to it. Why, we do not know. If it was an oversight, we now ask the court to correct that oversight. We think we are right in our contention that the act is unconstitutional. We may be wrong. In any event, we are entitled to know from this court whether we are right or wrong. The evidence in the record discloses the fact that the Larabees embarked in the litigation and employed many lawyers, acting upon the assurance of the lawyers that the Railway Company would have to pay them their fees if they won, and would not be charged for fees if they lost.

The finding of the Commissioner as to what was the cause of action ought to have been controlling on this court (see Brief, p. 55), especially in view of the fact that the court repudiated the rule announced in *State v. Ry. Co.*, 76 Kan. 501, that:

'We are not bound by the referee's conclusions, either of fact or law, as would be the case were the facts found by another court or jury or referee of another court.'

The Commissioner found that the action for mandamus 'was not based upon any right sought to be enforced predicated upon any duty of the Pacific Company,' imposed by any state or Federal statute, or by the judgment of any court, but upon a self-imposed duty. The element of fraud, 'malice, gross negligence, oppression or improper motives' did not enter into the controversy, and this court has uniformly heretofore held that attorneys' fees are not recoverable in any action to enforce a private right, in the absence of such elements.

Winstead v. Hulme, 32 Kan. 573-4.

It is inconceivable how the court can hold Section 723, Chapter 182, Laws of 1909, page 462, as not denying to this defendant the equal protection of the laws, without overruling its former decisions on the same subject, and especially the case of *Atkinson v. Woodmansee*, 68 Kan. 71. Suppose Section 723, *supra*, had read 'that in all actions of mandamus to enforce a private right, the plaintiff, on being awarded a peremptory writ, shall recover judgment for his attorneys' fees, railroad fare, hotel bills, theater tickets, etc.' Would this court, or any other court, hesitate to declare such a law unconstitutional and void, within the meaning of the Fourteenth Amendment to the Constitution of the United States? Yet this Honorable Court, by its decision in this case, has written into Section 723, *supra*, just such a provision, for the damages allowed include all of the foregoing items."

The State Court denied the petition for a rehearing, without comment. The State Court was in a predicament. If it sustained the statute, it must squarely overrule its opinion in the case of *Ahkinson v. Woodmansee*, 68 Kan. 71. If it held the statute unconstitutional, it must overrule its opinion in the case of *McClure v. Scates*, 64 Kan. 284. It, therefore, without comment on the subject, affirmed the report of the Commissioner, and, among others, awarded J. G. Waters a fee of

\$2,500, for services in the State Court, which *he*, under oath, stated would be fairly compensated by the payment of a fee not exceeding \$250.

Again, the Missouri Pacific Railway Company duly presented its exceptions to the Commissioner's report (Rec., pp. 47-52) as follows:

"The items or claims numbered tenth, twelfth, thirteenth, fourteenth and fifteenth should have been disallowed, and defendant moves that the same, and each thereof, be stricken out and disallowed, for the following reasons, *viz.*:

First. There is no evidence in the record to support the same, or any thereof, as either just, lawful or reasonable.

Second. Under Section 723, of Chapter 182, Laws of 1909, as construed by this court in the case of *McClure v. Scates*, 64 Kan. 284, the allowance of said items of damage is in violation of the Constitution of the United States, and denies to this defendant the equal protection of the law, and deprives this defendant of its property without due process of law. That said Section 723, as construed by this court, as aforesaid, is unconstitutional and void, and in conflict with the Constitution of the United States.

Third. Because this court had and has no jurisdiction, power or authority to consider, determine or award to said Mill Company any item, claim or demand for alleged damage which it is claimed accrued after December 24th, 1906, when this cause, and all proceedings connected therewith, was removed into the Supreme Court of the United States, by proceedings in error duly and properly instituted therein, under and in pursuance of the Federal Judiciary Act (U. S. Comp. Stat. 1901, Vol. 1, Secs. 999, 1000, 1003, 1010), and in strict compliance therewith. That said defendant, on December 24th, 1906, executed a bond to the Mill Company in the sum of \$20,000.00, that it would pay to said Mill Company all damages which it might sustain by reason of such proceedings in error, if the same were not prosecuted to effect, and without unnecessary delay. That, by virtue of such proceedings, this court lost all jurisdiction of this cause,

except to carry into effect its final judgment, of date December 8th, 1906, and enter the mandate of the Supreme Court of the United States."

The State Court, however, in passing upon this exception, simply adopted the brief prepared by the Commissioner in behalf of the lawyers for the Mill Company, and said that:

"In original proceedings in mandamus to compel a railway company to furnish transfer services to a shipper, judgment was given for the plaintiff, and the peremptory writ allowed. Thereupon the defendant sued out a writ of error to the Supreme Court of the United States, where the judgment was affirmed. The plaintiff then filed in this court a claim for damages. Held:

1. The Judiciary Act (Rev. Stat. U. S.) was not intended to affect and does not affect the jurisdiction of this court.

2. The jurisdiction of this court in mandamus attaches upon the issuance of the alternative writ, and continues unabated, not only until the peremptory writ issues, but until obedience thereto is enforced.

3. The allowance of the writ of error did not operate to remove the suit from the Supreme Court of the state to the Supreme Court of the United States, but merely operated to bring up the record for review.

4. The allowance of the writ of error did not supersede the judgment; the taking of the bond brought about the *supersedeas*.

5. The damages in mandamus proceedings comprehended by Section 723 of the Code (Genl. Stat. 1909, Sec. 6319) are the injuries sustained as the natural and probable consequences of the wrongful refusal to comply and the expenses reasonably and necessarily incurred in compelling compliance with the alternative writ, including reasonable attorneys' fees in this court and in the Supreme Court of the United States."

Mr. Justice Porter, in his opinion, said (Rec., pp. 273-274):

"The contentions of the defendant are that these claims cover expenses incurred in the Supreme Court of

the United States, and not in this court, that the Judiciary Act of the United States (Rev. St. U. S. —) deprives this court of all power to allow in this proceeding any damages or expense incurred as a result of the proceeding in error, that the *supersedeas* bond taken at the time the writ of error was allowed was conditioned that the plaintiff in error should answer all damages, and that the only remedy of the Mill Company was to apply to the Supreme Court of the United States for the allowance of its claim for damages, and that upon the affirmance of the judgment in this case, that court did allow to the Mill Company the sum of \$20.00 as and for its counsel fees in that court.

Again the conclusions of the learned Commissioner are so clearly and forcibly stated that we adopt them as a part of our opinion. His language is:

'Upon this proposition I conclude:

1. That the jurisdiction of this court in mandamus is the creation of the Constitution and the Statutes of the State of Kansas.

2. That this court is the sole judge of what that Constitution and those statutes provide.

3. That the jurisdiction of this court in mandamus over persons within its jurisdiction cannot be affected by Act of Congress.

4. That the Judiciary Act does not and was not intended to affect the jurisdiction of this court.

5. That the jurisdiction of this court in mandamus attaches upon the issuance of the alternative writ, and the subject matter of the proceeding being the awarding a peremptory mandamus, that jurisdiction continues unabated, not only until the writ is awarded, but also until the writ is issued and obedience to it enforced.

6. That the alternative writ is a command of the performance of specified and prescribed duties; and return to the writ is a refusal to perform the duties prescribed; the judgment awarding a peremptory mandamus is a conclusive adjudication that such refusal was wrongful, and the act of the court compelling compliance with the command of the alternative writ.

7. That the damages comprehended by the Kansas Statute are the injuries sustained as the natural and probable consequences of the wrongful refusal to comply and the expenses reasonably and necessarily incurred in com-

pling compliance with the command of the alternative writ.

8. That the allowance of the writ of error did not operate to remove the suit from the Supreme Court of the state into the Supreme Court of the United States; its only effect was to bring up the record for purposes of review.

9. The allowance of the writ of error did not operate as a *supersedeas*; the taking the *supersedeas* bond brought about the *supersedeas*. The taking the bond, and the *supersedeas* itself, in so far as it can be conceived of as a substantial act, was the action of the Supreme Court of Kansas.

I conclude that the objection should be disallowed, and a claim for the reasonable compensation of the attorneys mentioned for their services in the case in the Supreme Court of the United States, and their reasonable and necessary expenses, should be allowed as part of the damages sustained by the Mill Company.'

The Commissioner also finds that no agreement has ever been made between the Mill Company and any of its attorneys as to the amount of their compensation, and that the attorneys will claim and accept, in full discharge of plaintiff's liability to them, whatever amount the court shall determine to be reasonable and allowed as part of the plaintiff's charges. After reciting at some length the character of the service performed by the plaintiff's attorneys in the preparation of their briefs and arguments in answer to the defendant's contentions in the controversy, the Commissioner concludes from all the evidence that a reasonable allowance for the services of Waters & Waters, in the Supreme Court of the United States, is the sum of \$5,000.00; and a like sum was allowed for the services of W. H. Rossington and Charles Blood Smith. The attorneys were also allowed their expenses in attending court. To John F. Switzer was allowed \$500.00 for services in the preparation of briefs."

This Court, on reading the opinion of Justice Porter (or rather his excerpts from the report of the Commissioner, and brief in behalf of the lawyers for the Mill Company), cannot

but reach the conclusion that the Railway Company did not have that fair and *impartial* consideration by the Commissioner or by the court to which it was entitled.

After the report (or rather brief) of the Commissioner was affirmed by the State Court, the Railway Company presented its petition for a rehearing (Rec., pp. 278-298), in which, among other things, it was said (Rec., pp. 287-298):

"The court is in error in holding that 'the damages in mandamus proceedings comprehended by Section 723 of the Code are in the injuries sustained as the natural and probable consequences of the wrongful refusal to comply, and the expenses reasonably and necessarily incurred in compelling compliance with the alternative writ,' including reasonable attorneys' fees in this court and in the Supreme Court of the United States.

When the peremptory writ was granted on December 8th, 1906, the alternative writ had spent its force. It was merged in the final judgment.

Price v. Bank, 62 Kan. 735.

No effort was thereafter made to enforce compliance with the alternative writ. The statute (Sec. 723 of the Code) contemplates no damage at the final judgment. (Brief, pp. 72-73.)

Again, we urge upon the court our contention, heretofore presented (Brief, pp. 78-81), and evidently not considered by the court, that the defendant, in suing out its writ of error and superseding the judgment, committed no wrong. It violated no statute. It complied with the law literally. The operation of the final judgment rendered by this court was suspended. The services performed by the attorneys in the Supreme Court of the United States, and expenses incurred, were not for the purpose of 'compelling compliance with the alternative writ.' By the judgment of this court, the defendant, while guilty of no wrong, is to be punished to the extent of \$11,480.00 and more, for the exercise in good faith of a plain statutory right. That is the effect of this court's decision. By such decision this court holds that the giving of *supersedeas* bond was an 'idle ceremony,' and had

no significance whatsoever (see Brief, p. 31) except to remove the record into the Supreme Court of the United States for review. This court, by judicial construction, has amended the Judiciary Acts of Congress, by placing upon the same a construction unsupported by any decision of any court, state or national; by assessing against the Railway Company, in the way of unreasonable and extravagant attorneys' fees and expenses, and other damages, a penalty for exercising a statutory right.

The court states that the 'damages in mandamus proceeding comprehended by Section 723 of the Code are the injuries sustained as the natural and probable consequences of the wrongful refusal to comply, and the expenses reasonably and necessarily incurred in compelling compliance with the alternative writ'; but, by what process of logic or reason can it be said that defending the proceedings in the Supreme Court of the United States was an injury sustained as the natural and probable consequence of a wrongful refusal to comply with alternative writ? Does Section 723 of the Code contemplate any such damage? The wording of the section most clearly indicates the damages which 'shall have been sustained' at the date of final judgment. Stronger or more significant language could not have been used.

The court, by its construction of the Judiciary Act of Congress, denied to the defendant a right, title and immunity specially set up and claimed under Sections 999, 1000, 1003, 1010, Compiled Stat. United States 1901, Vol. 1, and refused to give full force and effect thereto, and denied to the defendant the rights guaranteed to it by the Fourteenth Amendment to the Constitution of the United States and the laws passed in pursuance thereof.

In order to reach the conclusion which is reached in the decision and judgment of the court, it must necessarily have decided that the final judgment of December 8, 1906, awarding the peremptory writ of mandamus was set aside by the supersedeas and the writ of error from the Supreme Court of the United States to this court for the reason that the damages approved by this Court, accruing since the date of the judgment, were approved upon the theory that the alternative writ remained in force after the judgment awarding the peremptory writ.

In other words, the court holds that, while the proceedings were pending in the Supreme Court of the United States, the alternative writ remained operative and effecting, notwithstanding the final judgment awarding the peremptory writ.

Is it possible that such could be the law? Our understanding of the law has been, and no authority to the contrary can be found, that a final judgment in any controversy merged all issues and antecedent matters involved. (See brief, pp. 79-80.) This court now holds that this is not the law and awards damages for a disobedience of the alternative writ, after it had spent its force and become merged in the final judgment. The Commissioner, by whose findings and conclusions the court concludes it is bound, refers to no precedent to sustain his conclusions, and the counsel, for themselves or their clients, have found no precedent to sustain such an anomalous and unheard of proposition; and this court contents itself by approving the conclusions of the Commissioner, without any independent investigation, for it refers to no precedent to sustain it, and there is none.

The Supreme Court of the United States, in construing the Judiciary Act of Congress, invoked by the defendant, holds that: 'The bond and security given on the writ of error cannot be regarded as an idle ceremony. It was designed as an indemnity to the defendant in error should the plaintiff fail to prosecute with effect his writ of error.'

U. S. v. Addison, 22 How. (U. S.) 185.

This Honorable Court, however, disregards, without comment, the construction of the Judiciary Act by the Supreme Court of the United States in *Boyes v. Grundy*, 9 Pet. (U. S.) 275, and *In re Washington*, 140 U. S. 96-97 (See brief, p. 88), and proceeds to hold that: 'The Judiciary Act was not intended to affect, and does not affect, the jurisdiction of this court,' and the only reason given for such holding is that the court feels bound by the findings of the Commissioner. The Commissioner concludes, and the court thereon concludes, that: 'The jurisdiction of this court in mandamus attaches upon the issuance of the alternative writ and continues unabated, not only until the writ issues, but until obedience thereto is enforced.' As an abstract proposition this is true, but there is no

reasonable construction of Section 723 of the Code *supra* which confers upon this court jurisdiction to render judgment for damages accruing for disobedience of the alternative writ after final judgment awarding the peremptory writ. The proceedings in error were from the final judgment and not from the alternative writ. The writ of error and supersedeas bond did not suspend the alternative writ. That writ was suspended by and merged in the final judgment of this court. What did Congress mean by the Judiciary Act? The Commissioner says (and the court approves) that the 'allowance of the writ of error did not supersede the judgment; the taking of the bond brought about the supersedeas.' What difference does it make? Judgment of this court was superseded by force of the Judiciary Act. (See Brief, pp. 88-89.) This the court is compelled to concede, but, in order to have any excuse for allowing attorneys' fees in the Supreme Court of the United States for defending the proceedings there, the Commissioner wiped off of the statute book the Judiciary Act of Congress, and apparently this court, without giving the subject any independent investigation or consideration, approved it.

This defendant has not contended, and does not contend, that the Judiciary Acts of Congress deprived this court of its jurisdiction in mandamus, but it does contend, and no precedent to the contrary can be found, that, after final judgment of this court was superseded by writ of error and bond, as provided by the Judiciary Act of Congress, the operation of such final judgment was suspended and this court was deprived of all jurisdiction of the controversy while pending in the Supreme Court of the United States. This court, however, by its decision, or, rather, by the decision of the Commissioner, approved by the court, has amended by construction, the Judiciary Act of Congress by placing upon it a construction never before heard of by bench or bar since its enactment.

It is provided by Section 1010, U. S. Compiled Stat. 1901, Vol. 1, that:

'Where, upon a writ of error, judgment is affirmed in the Supreme Court or Circuit Court, the court shall adjudge to the respondent in error just damages for his delay, and single or double costs, at its discretion.'

And by Section 1003, Compiled Stat. 1901, Vol. 1, said Section 1010 is in all respects made applicable to 'writs of error from the Supreme Court to the state courts,' and so forth. (See Brief, pp. 87-88.) Construing these sections, the Supreme Court of the United States has said that:

'It is, therefore, solely within the decision of the Supreme Court whether any damages or interest (as a part thereof) are to be allowed or not in the cases of affirmance. If, upon the affirmance, no allowance of interest or damages is made, it is equivalent to a denial of any interest or damage.'

Boyes v. Grundy, 9 Pet. (U. S.) 275.

And this construction of these sections by the Supreme Court of the United States, was affirmed in *In re Washington*, 140 U. S. 96-97, and was concurred in by the Federal Court in the case of *Peoples Bank v. Aetna Ins. Co.*, 76 Fed. 550.

The Commissioner, however, holds that this construction placed upon these statutes by the Supreme Court of the United States is not the law, and his conclusion is approved by this court; and, therefore, it necessarily follows that the right and immunity invoked by the defendant in this proceeding has given and guaranteed to it by the Judiciary Act of Congress, and as construed by the Supreme Court of the United States, is denied and wholly disregarded; and the Commissioner (approved by the court) has written into the sections of the Judiciary Act referred to a construction never contemplated by Congress or approved by the Supreme Court of the United States, and has adopted a construction of such Act which imposes a penalty upon a party litigant who has the temerity to question a judgment of this court in a mandamus proceeding by writ of error in the Supreme Court of the United States by compelling such party to pay damages, including attorneys' fees, hotel bills, railroad fare, Pullman car fare, and theater tickets, as an element of damage provided by Section 723 of the Code of Civil Procedure of this state.

From the opinion filed in the court by Mr. Justice Porter, it would seem apparent that this court has approved such unheard of conclusions of the Commissioner only and solely because they were made by the Commis-

sioner in this case. There appears to have been no independent investigation, or consideration of this question—one fairly presented by the record—but the court contents itself by simply copying the report of the Commissioner and approving it as sound. The Commissioner in his report prepared an elaborate brief in support of plaintiff's claim for attorneys' fees, but no such brief seems to have been prepared on this proposition.

We respectfully ask the court to take up this question and determine whether or not the Supreme Court of the United States was wrong in the construction which it has placed upon these statutes, and which evidently apply to this proceeding. It would seem that the Commissioner reached the conclusion that these statutes did not apply because this is a mandamus proceeding. There appears to be no reason for distinguishing proceedings in error from the Supreme Court of the United States in this case from any other proceedings in error, but the conclusions of the Commissioner are based upon the ground that this is a mandamus proceeding and, therefore, parties are relieved from the operation of the Judiciary Act of Congress referred to. If the Commissioner and the court had given the force and effect to the Judiciary Act of Congress as claimed by the defendant, and as justified by the repeated decisions of the Supreme Court of the United States, no judgment could or would have been rendered by this court for any damages allowed which accrued after the Supreme Court of the United States acquired jurisdiction of the controversy under those Acts."

From the foregoing, and from the record, it will conclusively appear that the Missouri Pacific Railway Company has, from the inception of this controversy, challenged the jurisdiction of the state court, and it now presents to this Court a record which *incontestably* shows that it did not have before the Commissioner a fair and *impartial* trial; that it did not have before the state court that fair and impartial consideration of the controversy which its importance demanded.

Recapitulation.

The Railway Company, in an orderly way, and in the manner authorized and justified by the state statute and Code of Procedure, made its defense to the mandamus suit instituted by the Mill Company in the Supreme Court of the state. The alternative writ of mandamus (Rec., pp. 92-94) was the only pleading authorized by the statute on the part of the plaintiff, the Mill Company. The findings of fact in the original proceeding are incorporated in the decision of the state court (Rec., pp. 2-8), which was reviewed by this Court in *Mo. Pac. Ry. Co. v. Larabee Mills*, 211 U. S. 612, in which it appears that three-fifths of the entire mill product was shipped out of the State of Kansas and into other states. (Finding Second, Rec., p. 2.) The Railway Company interposed the defense that *at least* as to such three-fifths the state was without power or jurisdiction in the premises, as it would be a regulation of interstate commerce. In making this defense, the Railway Company relied upon the Constitution of the United States, the Interstate Commerce Act, and especially the case of *McNeil v. So. Ry. Co.*, 202 U. S. 543. (See Rec., pp. 19-20.)

The Supreme Court of Kansas decided against this contention (Rec., p. 9) and, on December 8, 1906, rendered a final judgment and awarded a peremptory writ of mandamus. The Railway Company, exercising a right given to it by the Federal Judiciary Act, sued out a writ of error in this Court to the Supreme Court of Kansas, and superseded its final judgment by giving the bond as provided by the Acts of Congress. The final judgment of the state court was affirmed by this Court (211 U. S. 612), Justices Moody and White dissenting. As soon as the mandate of this Court was filed with the clerk of the state court, the distinguished lawyers representing the Mill Company presented a claim for damages, called an "amended

statement and claim by plaintiff for damages" (Rec., pp. 106-108), which included the following items, on account of the proceedings in this Court, viz.:

For the reasonable value of the services of Waters & Waters in the Supreme Court of the United States, the sum of.....	\$40,000.00
For printing briefs.....	193.50
For the services of John F. Switzer, who assisted Waters & Waters.....	5,000.00
The reasonable value of the professional services of Rossington & Smith, in this Court.....	30,000.00
To railroad fare, hotel bills, etc., of Rossington & Waters.	500.00
Do.	480.00

Of these various sums, the state court, through its Commissioner, H. C. Sluss (who prepared the brief in behalf of the Mill Company's attorneys and incorporated it in his report) (Rec., pp. 22-42), allowed \$11,480, and it was approved *pro forma* by Justice Porter, and the Railway Company has assessed against it not only the sum of \$11,480, but over \$4,000 loss to the Mill Company, as a *penalty* or *punishment* for exercising a *right* guaranteed by the Constitution of the United States and the Acts of Congress made in pursuance thereof.

The attorneys for the Mill Company, emboldened by the judgment of the state court, in allowing them the outrageous amount for attorneys' fees (\$11,480), relying upon the precedent thus established, have served upon the Railway Company a notice, of which the following is a copy:

"In the Supreme Court of the State of Kansas.
The Larabee Flour Mills Company, Plaintiff,
vs. No. 15167.
The Missouri Pacific Railway Company, Defendant.

NOTICE.

To the Defendant and its Attorney, Hon. B. P. Waggener:
You are hereby notified that the plaintiff will present

to the Supreme Court of the State of Kansas, as additional items of damage in above cause, and demand their allowance as damages in above cause, the money the plaintiff will be reasonably and necessarily required to pay out and become liable for, for the hiring of attorneys and the costs and expenses in defending the writ of error and the proceedings instituted by the defendant in the Supreme Court of the United States.

Dated at Hutchinson, Kansas, this 16th day of November, 1911.

THE LARABEE FLOUR MILLS COMPANY,
By F. D. LARABEE, Plaintiff."

It is, therefore, reasonable to suppose that if this Court should again affirm the state court in this proceeding, another "amended statement" will be filed in the state court for "reasonable" attorneys' fees, railroad fare, hotel bills, briefs, Pullman car fare and "incidentals," etc., paid out and expended in and about the defense of this proceeding, and so on *ad infinitum*.

If the attorneys' fees, railroad fare, hotel bills and "incidentals" (\$11,480) are recoverable because of the former proceedings in this Court, then such items may be recovered in every proceeding in error from this Court to a state court.

The Judiciary Act establishes and guarantees the *right* of a party litigant to review in this Court the final judgment of a state court.

"Sec. 999. When the writ is issued by the Supreme Court to a Circuit Court, the citation shall be signed by a judge of such Circuit Court, or by a justice of the Supreme Court, and the adverse party shall have at least thirty days' notice; and when it is issued by the Supreme Court to a state court, the citation shall be signed by the Chief Justice, or judge, or chancellor of such court rendering the judgment or passing the decree complained of, or by a justice of the Supreme Court of the United States, and the adverse party shall have at least thirty days' notice.

Sec. 1000. Every justice or judge signing a citation on any writ of error shall, except in cases brought up by the United States or by direction of any department of the Government, take good and sufficient security that the plaintiff in error, or the appellant, shall prosecute his writ or appeal to effect, and, if he fail to make good his plea, shall answer all damages and costs, where the writ is a supersedeas, and stays execution, or all costs only where it is not a supersedeas as aforesaid.

Sec. 1003. Writs of error from the Supreme Court to a state court in cases authorized by law shall be issued in the same manner and under the same regulations, and shall have the same effect, as if the judgment or decree complained of had been rendered or passed in a court of the United States.

Sec. 1010. Where, upon a writ of error, judgment is affirmed in the Supreme Court or a Circuit Court, the court shall adjudge to the respondents in error just damages for his delay, and single or double costs, at its discretion."

As often decided by this Court, when a party litigant complies with these requirements, if a Federal question is involved, and a right or immunity guaranteed by the Constitution of the United States or the laws passed in pursuance thereof is denied, this Court acquired jurisdiction by force of the statute. (Secs. 999, 1000, 1003, 1010 *supra*.)

Never before in the history of the jurisprudence of this country has any state court attached to the *right* of review any other conditions or requirements than those prescribed by the Federal Judiciary Act *supra*. The Mill Company invoked a remedy in the state court against the Railway Company, based upon Civil Code 697, Genl. Stat. 1901, Sec. 5193, as construed by the state court in *McClure v. Scates*, 64 Kan. 284, which reads as follows:

"If judgment be given for the plaintiff, he shall recover the damages which he shall have sustained, to be ascertained by the court or jury, or by referees, as in a

civil action, and costs; and a peremptory mandamus shall also be granted to him without delay."

The state court (Rec., pp. 268-269) not only in effect but directly nullifies and destroys the Judiciary Act. (Secs. 999, 1000, 1003, 1010 *supra*.) It approved the conclusions of the Commissioner (Rec., pp. 273-274) in denying the right and immunity set up by the Railway Company under the Judiciary Act (Secs. 999, 1000, 1003, 1010), and said that:

"Again, the conclusions of the learned Commissioner are so clearly and forcibly stated that we adopt them as a part of our opinion. His language is:

"Upon this objection I conclude:

1. That the jurisdiction of this court in mandamus is the creation of the Constitution and the statutes of the State of Kansas.
2. That this court is the sole judge of what that Constitution and those statutes provide.
3. That the jurisdiction of this court in mandamus over persons within its jurisdiction cannot be affected by Act of Congress.
4. That the Judiciary Act does not and was not intended to affect the jurisdiction of this court.
5. That the jurisdiction of this court in mandamus attaches upon the issuance of the alternative writ, and the subject matter of the proceeding being the awarding a peremptory mandamus, that jurisdiction continues unabated, not only until the writ is awarded, but also until the writ is issued and obedience to it enforced.
6. That the alternative writ is a command of the performance of specified and prescribed duties; and return to the writ is a refusal to perform the duties prescribed; the judgment awarding a peremptory mandamus is a conclusive adjudication that such refusal was *wrongful*, and the act of the court compelling compliance with the command of the alternative writ.
7. That the damages comprehended by the Kansas statute are the injuries sustained as the natural and probable consequence of the *wrongful* refusal to comply and the expenses reasonably and necessarily incurred in com-

pling compliance with the command of the alternative writ.

8. That the allowance of the writ of error did not operate to remove the suit from the Supreme Court of the state into the Supreme Court of the United States; its only effect was to bring up the record for purposes of review.

9. The allowance of the writ of error did not operate as a supersedeas; the taking the supersedeas bond brought about the supersedeas. The taking the bond, and the supersedeas itself, in so far as it can be conceived of as a substantial aid, was the action of the Supreme Court of Kansas.

I conclude that the objection should be disallowed and a claim for the reasonable compensation of the attorneys mentioned for their services in the case in the Supreme Court of the United States, and their reasonable and necessary expenses, should be allowed as part of the damages sustained by the Mill Company.' ”

It will be observed that the court emphasizes the conclusion that:

“The taking the bond, and the supersedeas itself, in so far as it can be conceived of as a substantial act, *was the act of the Supreme Court of Kansas.*”

Thus it will be seen that the Judiciary Acts of Congress are unceremoniously swept aside and the decisions of this Court on the subject wholly ignored or disregarded.

Boyes v. Grundy, 9 Pet. (U. S.) 275.
In re Washington, 140 U. S. 96-97.

In other words, the state court holds that the “damages” to be allowed are governed and controlled exclusively by the state statute *supra*, while the cause is pending in this Court under and by virtue of Federal statute, cited *supra*.

Suppose the state statute, instead of reading as it does, should read as follows:

"If judgment be given for the plaintiff, he shall recover the damages which he shall have sustained, to be ascertained by the court or jury, or by referees, as in a civil action, and costs; and a peremptory mandamus shall also be granted to him, without delay. Provided, however, if the defendant shall attempt, by writ of error or otherwise, to review the final judgment of the court in the Supreme Court of the United States, in the manner as authorized by Sections 999, 1000, 1003 and 1010 of the Judiciary Act, and such final judgment shall be affirmed, the defendant shall pay to the plaintiff all additional damages he may sustain by reason of such proceedings in error, including attorneys' fees, railroad fare, hotel bills, 'incidentals,' etc., anything in the Acts of Congress to the contrary notwithstanding."

Would this Court hesitate for a moment to declare such a statute null and void, and wholly inoperative? Yet the Supreme Court of Kansas, by its construction of Section 5193, Genl. Stat. 1901, has written into that section just such a clause, and its judgment herein is based upon that construction. By this conclusion the state court is squarely in conflict with Section 25, Art. VI of the Constitution of the United States, which provides that:

"This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

If the precedent established by the state court shall be approved and affirmed by this Court, it will be in the power of any state legislature, or state court, by construction, to impose such conditions upon the exercise by a party litigant of a *right*

given by the Judiciary Acts (Secs. 999, 1000, 1003 and 1010 *supra*) as will take away and destroy that right. In order to preserve the integrity of that most valuable right, it would seem necessary for this Court to prevent *any* encroachment by state legislation or state courts.

It is somewhat strange, to say the least, that neither the Commissioner nor the court would pass upon the question so often presented to the Commissioner during the hearing before him (Rec., pp. 127-128), viz.:

"Defendant, the Missouri Pacific Railway Company, objects to all evidence proving, or tending to prove, the value of services rendered by Waters & Waters, as attorneys at law, in and about the institution of this proceeding, and the litigation thereafter following in the Supreme Court of the State of Kansas, for the following reasons:

First—Because the section of the Code which reads that 'If judgment be given for the plaintiff, he shall recover the damage which he shall have sustained, to be ascertained by the court or jury, or by a referee, as in a civil action, and costs, etc.,' as construed by the Supreme Court of Kansas allowing the plaintiff in such action, as an element of damages, an attorney's fees, is in violation of the Constitution of the United States in denying to the said defendant the equal protection of the law, and gives to the plaintiff in this controversy rights and privileges and protection on account of damages which are not given to the defendant under like circumstances and condition, and because of such prohibition of the Constitution of the United States the said defendant is not liable in this action for any attorneys' fees paid out, or agreed to be paid out, by the said plaintiff in this controversy.

Second—Because to allow said plaintiff to recover attorneys' fees for services performed by their attorneys in a proceeding in the Supreme Court of Kansas would deny to said defendant the equal protection of the law and give to the said plaintiff a right and privilege which, under the statutes of the State of Kansas, as construed by the Supreme Court of Kansas, is denied to the defendant in this action.

Third—Because to allow plaintiff, in this particular action, to recover, as damages, attorneys' fees paid out, or agreed to be paid out, would be to give to the said plaintiffs an unequal and unjust advantage because, under the decision of the Supreme Court of Kansas construing said statute, said defendant cannot, under any circumstances, recover attorneys' fees in event it should be successful in this litigation, and, therefore, as construed by the said court, such ruling denies to the said defendant the equal protection of the law and is in violation of the Constitution of the United States.

Fourth—Because said plaintiffs have made no showing that they have agreed to pay said plaintiffs' attorneys any particular sum of money, or that they have paid any particular sum of money; that the damages claimed on account of attorneys' fees are speculative, conjectural and contingent and are not legally or properly involved in this controversy, and all evidence should be excluded proving, or tending to prove, such services, or the value thereof, as incompetent, irrelevant and immaterial.

Which objection was by the Commissioner overruled; to which action and ruling of the Commissioner the defendant at the time then and there duly and seasonably excepted, and the said witness was permitted to testify as to the services which he had performed in advising said plaintiffs previous to the institution of the mandamus proceedings, and to the services performed by him in the institution of such proceedings, and in the taking of evidence or preparation of briefs, and the argument before the Supreme Court of the State of Kansas." (Rec., pp. 131, 136-7-8-9.)

The state court, in the case of *Atkinson v. Woodmansee*, 68 Kan. 71, held that a similar statute (Sec. 5125, Genl. Stat. Kan. 1901) was unconstitutional and void, and expressly approved the decision of this Court on the same subject in the case of *Gulf, Col. & Santa Fe v. Ellis*, 165 U. S. 150.

Instead, however, of passing upon this important question, and holding that Section 5193, Genl. Stat. 1901, as construed by the court in the case of *McClure v. Scates*, 64 Kan. 284,

was either valid or void, ignored the question and allowed Waters & Waters \$2,500 as attorneys' fees for services in the state court, the value of which Waters himself placed at not exceeding \$250. (Rec., p. 140.)

An examination of the entire record will disclose an effort on the part of attorneys for the Mill Company, under the pretense of claiming "damages" for that Company, to collect from the Railway Company an extravagant and ridiculous claim for attorneys' fees, as damages which the Mill Company had not paid, and was under no earthly obligation to pay.

The Commissioner found that (Rec., p. 33) :

"I find that no agreement has ever been had between the Mill Company and any of the attorneys as to the amount of their compensation; that neither of the attorneys has at any time entered on his books a charge against the Mill Company for services rendered; nor have they informed the Mill Company of the amount intended to be charged; nor have they determined in their own minds any definite amount intended to be charged.

I find that the attorneys will claim the full amount, and will accept whatever amount that shall be determined by this court in this proceeding to be a reasonable compensation for their services in the case and allowed as part of the damages.

I further find that it is mutually understood between the Mill Company and the attorneys named that whatever amount is recovered in this proceeding on account of fees and expenses of counsel will be paid by the Mill Company to and accepted by the attorneys as a full discharge of the liability to them."

It must be evident to this Court that the attempt to collect the extravagant attorneys' fees allowed by the state court was a speculation pure and simple on the part of the attorneys representing the Mill Company. There is not one word in the entire record indicating that the Mill Company had ever

become legally or morally liable for these attorneys' fees; and the Commissioner, by his finding, as before stated, conclusively establishes the fact that the Mill Company had not obligated itself to pay those attorneys' fees, or in fact any attorneys' fees, unless it was successful in collecting the same from the Railway Company.

Again, the attention of the Court is called to Section 5146, General Statutes 1909, Kansas, which provides:

"Every person, company or corporation within or without this state, their officers, agents, representatives or consignees, violating any of the provisions of this Act within this state are hereby denied the right, and are hereby prohibited from doing any business within this state, and all persons, companies and corporations, their officers, agents, representatives and consignees within this state, are hereby denied the right to handle the goods of or in any manner deal with, directly or indirectly, any such person, company or corporation, their officers, agents, representatives or consignees."

The Mill Company was engaged in handling the product of its mill in a way that was prohibited, not only by the laws of Kansas, but by the Sherman Anti-Trust Act. It used its power in the association of which it was a member to control the price of grain in the section of the country represented by the association in the state of Kansas, and also the price of flour in the states of Oklahoma and Texas; and, for an interruption of this unlawful business or power, the Court is invoked to add to their unlawful gains and profits.

We respectfully submit that, on the entire record, the judgment of the court below should be reversed and the proceedings instituted to collect damages should be dismissed.

B. P. WAGGENER,
Attorney for Plaintiff in Error.

76
Office Supreme Court, U. S.
FILED.

DEC 26 1912

JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

October Term, 1912.

MISSOURI PACIFIC RAILWAY COMPANY,
Plaintiff in Error,
VS.

F. D. LARABEE AND F. S. LARABEE, DOING
BUSINESS UNDER THE FIRM-NAME OF THE LAR-
ABEE FLOUR MILLS COMPANY,
Defendant in Error.

No. 135

MOTION OF DEFENDANT IN ERROR TO DISMISS THE WRIT OF ERROR, OR TO AFFIRM.

JOSEPH G. WATERS,

CHARLES BLOOD SMITH,

JOHN C. WATERS,

Attorneys for Defendant in Error.

JOHN F. SWITZER,

Of Counsel.



In the Supreme Court of the United States.

October Term, 1912.

MISSOURI PACIFIC RAILWAY COMPANY, <i>Plaintiff in Error,</i>	} No. 479.
vs.	
F. D. LARABEE AND F. S. LARABEE, DOING BUSINESS UNDER THE FIRM-NAME OF THE LAR- ABEE FLOUR MILLS COMPANY, <i>Defendant in Error.</i>	

MOTION OF DEFENDANT IN ERROR TO DISMISS THE WRIT OF ERROR, OR TO AFFIRM.

THE defendant in error herein moves the court to dismiss the writ of error in the above entitled action sued out by the plaintiff in error, or to affirm the judgment for the reason that the questions on which the jurisdiction of this court depends are so frivolous as not to need further argument, and respectfully states briefly the facts and objects of the motion to be as follows:

This case was originally commenced in the Supreme Court of Kansas by the Larabee Flour Mills Company,

against the Missouri Pacific Railway Company to compel the Missouri Pacific Company to restore to the Mills Company the use of the transfer track connecting the tracks of the Missouri Pacific with the track of the Santa Fe; the mill of the Mills Company being located on the track of the Missouri Pacific, and over which transfer track all persons desiring to use such transfer track were given the right to use such transfer track, and did so use it. The Missouri Pacific having a claim for the detention of cars against the Larabee Mills Company which the Larabee Mills Company refused to pay, the Missouri Pacific, for that one reason, shut off the use of such transfer track from the Larabee Mills Company.

In the suit by the Larabee Mills Company after a trial, a peremptory writ of mandamus was awarded requiring the Missouri Pacific to restore the use of the transfer track to the Larabee Mills Company, and rendering judgment for costs and damages, against the Missouri Pacific.

The Missouri Pacific sued out a writ of error to this court, and the case was tried and affirmed in this court. Upon being sent back to the Supreme Court of Kansas, the case was referred to a commissioner to hear the testimony and make conclusions of fact and

law on the question of damages, which he did, and reported back to the Supreme Court that he had allowed damages, by reason of the expenditures and liability of the Mills Company, among which, was the outlay of money made a necessary expense to the Mills Company, for attorneys' fees, and other kindred expenses, for presenting the case in this court. This report was in all things approved by the Supreme Court of Kansas, and judgment was rendered for such outlays and expenses, along with other expenses, and for damages to the milling business of the Larabee Mills Company; and from which judgment, the Missouri Pacific again sued out its writ of error to this court, and alleges that the allowance of said damages was the taking of the property of the Missouri Pacific without due process of law; that the Missouri Pacific was deprived of the equal protection of the laws; that the judgment was in violation of the Constitution of the United States, the laws of the United States, the Fourteenth Amendment, the Federal Judiciary Act; and that the allowance for expenditures for attorneys in presenting the case of the Larabee Mills Company to this court was illegal and in violation of the jurisdiction of this court.

The defendant in error alleges, that in the record as

made by the plaintiff in error, it is apparent that no Federal question exists; that the entire suit was a local suit, based upon a local statute allowing such damages; that it is further apparent of such record that the controversy wholly pertains to the internal affairs of the State, wholly based on its own laws and decisions, and is not within the jurisdiction of the courts of the United States.

Respectfully submitted.

JOSEPH G. WATERS,
CHARLES BLOOD SMITH,
JOHN C. WATERS,

Attorneys for Defendant in Error.

JOHN F. SWITZER,
Of Counsel.

479
No. 555

Office Supreme Court, U. S.
FILED.

JAN 10 1918

JAMES H. MCKENNEY
CLERK

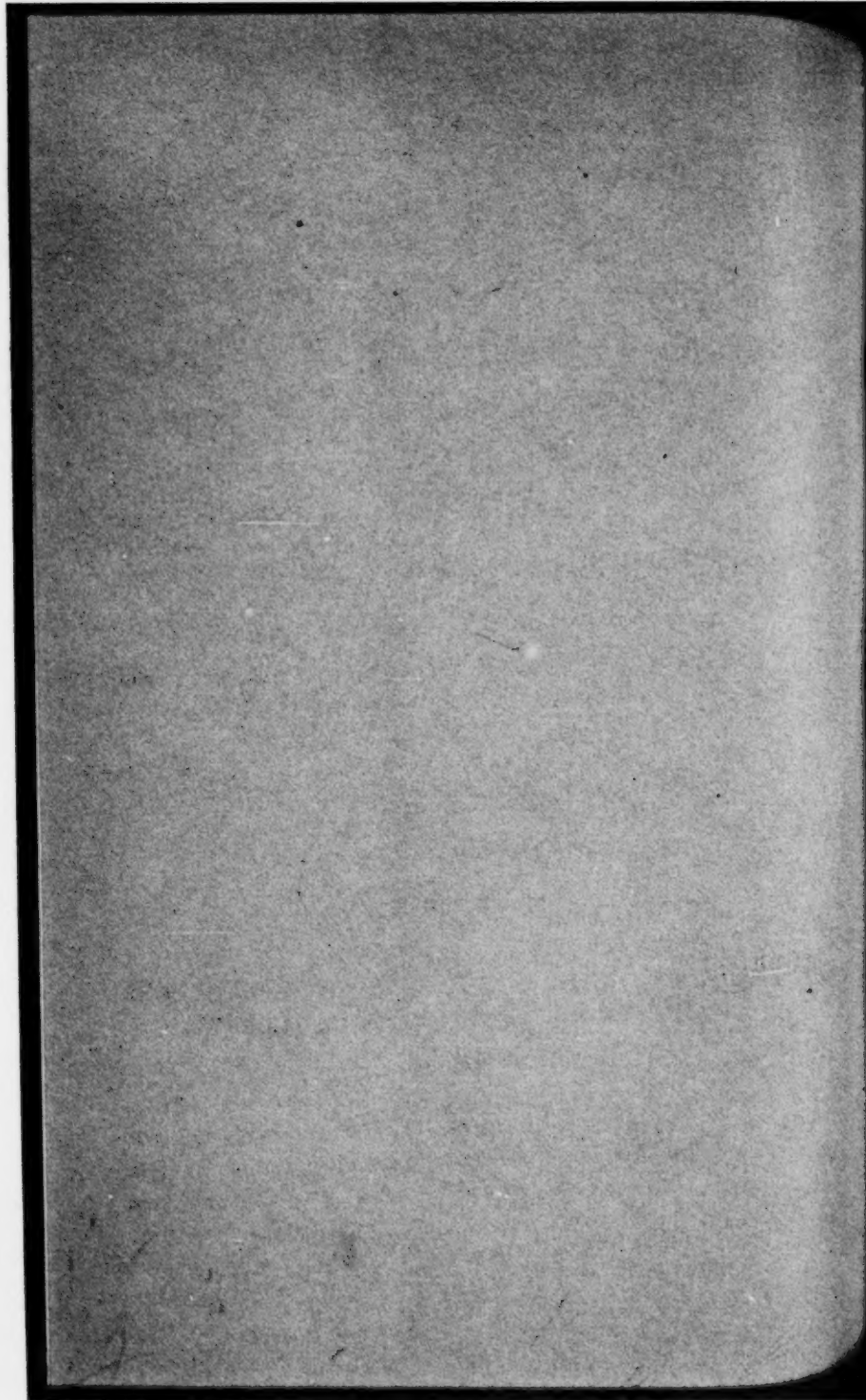
In the
Supreme Court of the United States
October Term, 1911.

THE MISSOURI PACIFIC RAILWAY COMPANY, Plaintiff in Error,
VS.

**F. D. LARABEE and F. S. LARABEE, partners in business under
the style and firm name of THE LARABEE FLOUR MILLS
COMPANY, Defendants in Error.**

**BRIEF OF PLAINTIFF IN ERROR IN OPPOSITION
TO MOTION OF DEFENDANT IN ERROR
TO DISMISS OR AFFIRM.**

B. P. WAGGENER,
Attorney for Plaintiff in Error.



In the
Supreme Court of the United States
October Term, 1911.

THE MISSOURI PACIFIC RAILWAY COMPANY, *Plaintiff in Error*,

VS.

F. D. LARABEE and F. S. LARABEE, partners in business under
the style and firm name of THE LARABEE FLOUR MILLS
COMPANY, *Defendants in Error*.

No. —

**BRIEF OF PLAINTIFF IN ERROR IN OPPOSITION
TO MOTION OF DEFENDANT IN ERROR
TO DISMISS OR AFFIRM.**

A motion to dismiss the writ of error, or to affirm, has been filed by the defendant in error, upon the ground "that in the record, as made by the plaintiff in error, it is apparent that no Federal question exists, etc."

The plaintiff in error has heretofore filed with the clerk its brief and argument in support of its writ of error, and the attention of the Court is respectfully invited to that brief, to be considered in connection with the "motion to dismiss the writ of error, or to affirm."

The record contains the assignment of errors (Rec., pp. 302-305), and the brief in support of the writ of error contains the same assignment of errors (Brief, pp. 12-15), and also specification of errors (Brief, pp. 16-18) relied upon by plaintiff in error. An effort has been made to condense the assignment of errors into specification of errors, to avoid repetition as much as possible in presentation of errors complained of, without intending to waive any assignment of error.

BRIEF AND ARGUMENT.

FIRST.

The first specification of error (Brief on the Merits, p. 19) is as follows:

The Supreme Court of Kansas erred in refusing to hold that Section 5193, General Statutes of Kansas 1901 (being Section 723, Chapter 182, Laws of Kansas 1909), as construed by that court in *McClure v. Scates*, 64 Kan. 284, was unconstitutional and void, and in conflict with the Fourteenth Amendment to the Constitution of the United States, and denied to the defendant the equal protection of the law, and deprived it of its property without due process of law; and in holding and deciding that the Mill Company, as an element of damage, was entitled to recover expenses of litigation, including attorneys' fees, in that court, and in the Supreme Court of the United States, which decision and judgment of said court was in violation of the Constitution of the United States and the laws of Congress enacted in pursuance thereof.

The entire cause of action and claim of the Mill Company was founded upon Section 5193, General Statutes 1901, which is as follows:

"If judgment be given for the plaintiff, he shall recover the damages which he shall have sustained, to be ascertained by the court or jury, or by referees, as in a *civil action*, and costs; and a peremptory writ shall also be granted to him without delay."

And upon the construction of it by the Supreme Court of Kansas, in the case of *McClure v. Scates*, 64 Kan. 282-284, that the word "damage," as therein used, included the "*necessary outlay* for attorneys' fees, etc."

The Railway Company, at every opportunity, raised the objection and made the contention that, as thus construed by the state court, the statute was unconstitutional and void, because it denied to the defendant in *this* litigation the equal protection of the law, and deprived it of its property without due process of law, and was in contravention of the Fourteenth Amendment to the Federal Constitution. (Rec., pp. 127-128, 131.) The record (pp. 196-267) contains the brief and argument on this question presented to the Supreme Court of Kansas in opposition to the confirmation of the Commissioner's report, in which the unconstitutionality of this statute, as applied to this case, was presented at great length. (Rec., pp. 227-237.) The state court refused, or at least neglected, to respond to the objections made by the defendant, although, in the case of *Atkinson v. Woodmanse*, 68 Kan. 71, it had decided that Section 5125, Genl. Stat. Kansas—almost identical with Section 5193, Genl. Stat. 1901—was in conflict with the Constitution of the United States, and based its decision upon the rule announced by this Court in *Gulf, Col. & S. F. v. Ellis*, 165 U. S. 153. (See Brief on file to the Merits, pp. 19-49.)

In the brief and argument in support of motion to dismiss or affirm it is said that (p. 7) :

"The Commissioner heard evidence and allowed the Mills Company the amount paid and for which it was responsible to its attorneys."

And the whole foundation of the argument is that the Supreme Court of Kansas allowed what was necessary to reimburse the Mill Company for the "*amount it had paid and for*

which it was responsible to its attorneys." There is a finding of fact, made by the Commissioner and approved by the court, to the effect and from which it conclusively appears that the most extravagant claim for damages, in the form of attorneys' fees, is nothing more or less than an attempt to make the Railway Company pay attorneys' fees which the Mill Company had *not* paid, or in any manner become responsible for.

The Commissioner found that (Rec., p. 33):

"I find that no agreement has ever been had between the Mill Company and any of the attorneys as to the amount of their compensation; that neither of the attorneys has at any time entered on his books a charge against the Mill Company for services rendered, nor have they informed the Mill Company of the amount intended to be charged; nor have they determined in their own minds any definite amount intended to be charged.

I find that the attorneys will claim the full amount, and will accept whatever amount that shall be determined by this court in this proceeding to be a reasonable compensation for their services in the case, and allowed as part of the damages.

I further find that it is mutually understood between the Mill Company and the attorneys named that whatever amount is recovered in this proceeding on account of fees and expenses of counsel will be paid by the Mill Company to and accepted by the attorneys as a full discharge of the liability to them."

This claim and demand for \$79,274.10 was made and entertained by the state court *after* the mandate from this Court had been lodged with the state court, and that part of it for attorneys' fees is as follows, *viz.*:

"In the amended statement and claim for damages are found the following items (Rec., p. 106):

6th. For amount paid Vandiveer & Martin, for legal services.	\$ 25.00
--	----------

7th.	For services of C. G. Webb, attorney....	500.00
8th.	Paid to J. G. Waters, independently of hiring him in this action, for coming to Stafford, for counsel and advice..	75.00
9th.	For the reasonable value of services of Waters & Waters, to bring this action, and to attend to same in Supreme Court of Kansas.....	2,500.00
10th.	For the reasonable value of services of Waters & Waters, in this case, in Supreme Court, United States.....	40,000.00
11th.	For cash paid out for printed briefs in state and United States Supreme Courts.	193.50
12th.	For reasonable value of professional services of John F. Switzer, attorney, to assist Waters & Waters in Supreme Court, United States.....	5,000.00
13th.	For the reasonable value of professional services of Rossington & Smith.....	30,000.00
14th.	For railroad fare, hotel bills and reasonable expenses of W. H. Rossington and J. G. Waters in attending on Supreme Court, United States, in April, 1908, sum of \$250 each, making total of.	500.00
15th.	For railroad fare, hotel bills and reasonable expenses of Charles Blood Smith and J. G. Waters in attending on Supreme Court in October, 1908....	480.60

\$79,274.10

Making a total of attorneys' fees and expenses of upwards of \$79,274.10 for a controversy which, in its inception, involved \$79.00."

The Railway Company sought immunity under the Federal Constitution, and supported its contention by an unbroken line of decisions of this Court and the state courts (Brief on Merits, pp. 25-49) that the statute of Kansas (Sec. 5195, Genl. Stat.

1901) was void, and could not be enforced when applied to the facts in this case. This contention was unavailing, and the Railway Company was penalized to the extent of over \$20,000 because it had the temerity to invoke a statutory *right*, under the Federal Judiciary Act (Secs. 999, 1000, 1003, 1010, Comp. Stat. U. S., Vol. 1), and obtain a writ of error from this Court to the state court to review its judgment in the original case.

Speaking of the statute, it is said in counsel's brief (p. 32) :

"Of course it must be in good faith, and must not, under the color and sanctity of the law, inflict exceptional or unjust exaction."

Again, the learned counsel say (Brief, pp. 33-34) :

"Of course it must be so considered, construed and applied in good faith, and must not, under the color of its authority, be made the instrument of oppression or inflict unreasonable exactions."

And the learned counsel unwittingly throw off their masks when they say (their Brief, p. 38) :

"We cannot conceive a more urgent call on the power of the state than to provide a remedy that will be sufficient to not only *punish* the one who disobeys its command, and to perform a duty, *but to be a deterrent to others*; THIS IS WHAT THE STATE LAW IS."

The learned counsel have properly characterized Section 5193, Genl. Stat. Kansas 1901. They admit that this law, *as enforced by the state court in this case*, was not intended to reimburse the Mill Company for *its* damages, but that it was intended to "provide a remedy that will be sufficient to not only *punish* the one who disobeys its command to *perform a duty, but to be a deterrent to others*." This is the argument

which was made to the Commissioner and to the Supreme Court of Kansas, which responded by fixing the *punishment* of the Railway Company at over \$20,000—not because it disobeyed any command of that tribunal, but because, and *solely* because, it exercised a *lawful* right guaranteed to it by the Federal Constitution, and laws passed in pursuance thereof, and procured a writ of error from this Court to the state court to review its final judgment, rendered December 8, 1906.

Notwithstanding this admission on the part of counsel for the Mill Company, and notwithstanding the unblushing attempt to enrich themselves out of the treasury of the Railway Company to the extent of \$79,274.10 for attorneys' fees, etc., *never paid* by the Mill Company, and for which it was in no manner liable, as a punishment to the Railway Company, and as a "deterrent to others," the counsel for the Mill Company, having in part accomplished their purpose, by the order and judgment of the state court, now gravely assert in their brief (p. 48) :

"That the plaintiff in error has had its day in court, and been given the due process of the law; that it has had the equal protection of the law, whose terms were open to all persons and corporations under *like* circumstances."

The learned counsel overlook the case of *Yick Wo v. Hopkins*, 118 U. S. 373, most pertinent here. The Court, in this case, is not obliged to reason from the probable to the actual, and pass upon the validity of this statute, "as tried merely by the opportunities which its terms afford of unequal and unjust discrimination" in its administration. This case presents the statute in actual operation, and the facts disclosed by the record establish an administration not only directed exclusively against a particular class, but against a particular party litigant, such "as to warrant and require the conclusion" that, whatever may have been the intent of the Legislature in

enacting this statute, its application in *this* case was so "unequal and oppressive as to amount to a practical denial by the state of that equal protection of the laws which is secured" to all persons "by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States."

In the case of *McClure v. Scates*, 64 Kan. 284, the Supreme Court of Kansas held that:

"The plaintiff was entitled to recover, *as damages*, the necessary outlay for attorneys, as well as for other loss and expenses resulting from the *wrong* of the defendants."

It must be borne in mind that the mandamus proceeding of the Mill Company was not instituted against the Railway Company to enforce any statutory duty enjoined upon it. The Commissioner finds (Brief on Merits, p. 27) :

"That the action for a mandamus was not based upon any right sought to be enforced, predicated upon any duty of the Pacific Company imposed by a statute of Kansas, or any provision of the Interstate Commerce Act.

That the duty sought to be enforced by mandamus was not a duty imposed, or sought to be imposed, upon the Pacific Company by this court, by its judgment."

The learned counsel now contend that the damages resulted from an attempt to enforce the police power of the state. Can this be true? In what respect was the state interested in the controversy? In what respect was the public interested? The action was to enforce a *private* right, and in no sense one to redress a public wrong. Why should the plaintiff in such an action enjoy a privilege and rule that the defendant should pay his attorneys' fees, railroad fare, hotel bills, etc., when such privilege is denied to the plaintiff in all other actions instituted to enforce a private right? In this proceeding why

should the Mill Company recover attorneys' fees, hotel bills, etc., if it is successful, and not be required to pay anything if unsuccessful?

Under the Kansas statute (Sec. 5193, Genl. Stat. 1901), as construed by the state court, these parties cannot appeal to the courts as other litigants under like conditions and with like protection. As said by this Court in the case of *Gulf, Col. & S. F. v. Ellis*, 165 U. S. 153:

"If litigation terminates adversely to them, they are mulcted in the attorneys' fees of the successful plaintiff; if it terminates in their favor, they recover no attorneys' fees. It is no sufficient answer to say that they are punished only when adjudged to be in the wrong. They do not enter the courts upon equal terms. They must pay attorneys' fees if wrong; they do not recover any if right; while their adversaries recover if right, and pay nothing if wrong. In the suits, therefore, to which they are parties they are discriminated against, and are not treated as others. They do not stand equal before the law. They do not receive its equal protection. All this is obvious from a mere inspection of the statute."

In the *Ellis* case, *supra*, this Court refers to the decision of the Supreme Court of Alabama in the case of *So. & Nor. R. Co. v. Morris*, 64 Ala. 193-199, in which it was stated that (165 U. S. 160):

"Justice cannot be sold or denied by the exaction of a pecuniary consideration for its enjoyment from one, when it is given freely and open-handed to another, without money and without price. Nor can it be permitted that litigants shall be debarred from the free exercise of this constitutional right by the imposition of arbitrary, unjust and odious discriminations, perpetrated under color of establishing peculiar rules for a particular occupation. Unequal, partial and discriminatory legislation, which secures this right to some favored class or classes and de-

nies it to others, who are thus excluded from that equal protection designed to be secured by the general law of the land, is in clear and manifest opposition to the letter and spirit of the foregoing constitutional provisions."

In the case of *Wilder v. R. R. Co.*, 70 Mich. 384, referred to by this Court in *R. R. Co. v. Ellis*, 165 U. S. 162, in discussing a statute which allowed to the successful plaintiff an attorneys' fee, it was said that:

"Calling it an 'attorneys' fee does not change its real nature or effect. It is a punishment of the company, and a reward to the plaintiff, and an incentive to litigation on his part. This inequality and injustice cannot be sustained upon any principle known to the law. It is repugnant to our form of government and out of harmony with the genius of our free institutions. The Legislature cannot give to one party in litigation such privileges as will arm him with special and important pecuniary advantages over his antagonist."

(See Brief on Merits, pp. 33-49, and cases there cited; and especially *Oelrichs v. Spain*, 15 Wall. 230-231, and *Tullock v. Mulvane*, 184 U. S. 510-512.)

As said by this Court (165 U. S. 160):

"Justice should not be sold or denied by the exacting of a pecuniary consideration for its enjoyment, from one when it is given freely, and open-handed to another, and without money and without price."

SECOND.

The second specification of error (Brief on Merits, pp. 49-50) is as follows:

The Supreme Court of Kansas erred in holding and deciding, contrary to the contention and claim of the defendant, and contrary to law, that the Judiciary Act of Congress (Sections 999, 1000, 1003, 1010, Compiled Statutes United States 1901, Vol. I) did not deprive the Supreme Court of Kansas of jurisdiction to assess damages against the defendant alleged to have accrued after the rendition of final judgment by it, and after such judgment had been superseded, as provided by said Judiciary Act, and was pending in the Supreme Court of the United States; and in holding that the allowance of the writ of error heretofore allowed herein did not operate to remove the suit from the Supreme Court of the state to the Supreme Court of the United States; and in holding that the Mill Company might recover in this proceeding damages and expenses, including attorneys' fees, which accrued AFTER the giving of the supersedeas bond, and during the time said proceedings were pending in the Supreme Court of the United States; and in holding and deciding that it had jurisdiction to render judgment against the Missouri Pacific Railway Company for expenses incurred and attorneys' fees, in defending the proceeding in error in the Supreme Court of the United States; and in refusing to hold that if attorneys' fees for services in defending the action in the Supreme Court of the United States, and expenses incident thereto, are recoverable at all, the same should be determined by that court, or in a proceeding on the supersedeas bond, and not by the Supreme Court of the State of Kansas in this proceeding; and in allowing such claim, acted without jurisdiction, and deprived the Rail-

way Company of its property without due process of law, and denied to it the equal protection of the law.

When the mandate of this Court affirming the judgment of the state court of December 8, 1906, was filed with the clerk of the state court, the Mill Company filed an AMENDED STATEMENT AND CLAIM BY PLAINTIFF FOR DAMAGES (Rec., pp. 106-109), and thereupon the following stipulation (Rec., pp. 109-110) was signed and filed:

"It is stipulated and agreed by and between the respective parties hereto that each party has reserved the right to present any objection or exception to the Referee or to the court to any question, evidence, matter or proceeding herein, to the same purpose and with like effect as if such objection or exception had been made and exceptions noted at the proper time; and neither party shall be held to have waived any right to present to the Referee or to the court any objection or exception by reason of having failed or neglected to have the same noted or made a matter of record at the time when such objection or exception might or should have been made, and record thereof preserved.

ROSSINGTON & SMITH,
JOHN F. SWITZER,
WATERS & WATERS,
Attorneys for Plaintiff.
B. P. WAGGENER,
Attorney for Defendant."

And thereupon the Railway Company presented and filed its objections and exceptions to each item of the "Amended Statement," etc. (Rec., pp. 110-116.)

It will be observed that the Railway Company (Rec., pp. 114-116), by its objection and exception, claimed immunity from any such claims or demands under and by virtue of Sections 999, 1000, 1003, 1010, Compiled Stat. U. S. 1901, Vol. 1 (pp. 712-715), and that the state court had no jurisdiction to

entertain a demand for damages to the Mill Company by reason of the writ of error allowed by this Court to the state court, but these objections and exceptions were brushed aside by the Commissioner and by the state court (Rec., pp. 268-276), and the Commissioner's report confirmed. (Rec., p. 276.)

A petition for a rehearing was presented to the state court (Rec., pp. 278-298), which, without comment, was overruled and denied by the court. (Rec., p. 298.) Learned counsel for the Mill Company attempt to make it appear (Brief, p. 3) that the Supreme Court of Kansas did not enter final judgment awarding peremptory writ of mandamus until *after* the mandate of this Court had been filed with the clerk of the state court, and until *after* the Commissioner had made his report as to the amount of damage. They state (p. 3 of their Brief):

"And the Supreme Court of Kansas *awarded the peremptory writ and execution* for the amount of such expenses and damages."

This is not true. The final judgment was entered on December 8, 1906, and the *peremptory writ on that date* was awarded. (Rec., p. 12.) Five years later (November 11, 1911) the judgment for damages was entered. (Rec., p. 298.) On December 8, 1906, when the final judgment was entered awarding the peremptory writ, the *alternative writ* had spent its force, and become merged in the final judgment of that date. The state court concluded that (Rec., p. 269):

"The damages in mandamus proceedings comprehended by Section 723 of the Code (Genl. Stat. 1909, Sec. 6319) are the injuries sustained as the natural and probable consequences of the wrongful refusal to comply, and the expenses reasonably and necessarily incurred in compelling compliance with the alternative writ, including reasonable attorneys' fees in this court and in the Supreme Court of the United States."

The refusal to obey the *alternative writ* is made the basis for the damages allowed, *which accrued after the final judgment* of December 8, 1906, and *while the controversy was pending in this Court*, brought here in strict compliance with the Federal Judiciary Act. (Secs. 999, 1000, 1003, 1010, Comp. Stat. U. S. 1901, Vol. 1.)

In the final judgment of December 8, 1906, the question of damage, if any, was not considered by the court. The claim of damages now complained of was injected into the case in 1909 (Rec., pp. 105-106) by leave of the state court, under the guise of an "Amended Statement," in which claim was made for over \$79,000 for attorneys' fees, hotel bills, railroad fares, etc., incurred by the Mill Company in *defending* the writ of error issued from this Court to the state court, for the purpose of reviewing the final judgment of the state court of December 8, 1906, when and by virtue of which the *peremptory writ* was issued.

The Railway Company sought refuge from these outrageous claims and demands by planting itself squarely on the Federal Judiciary Acts (Secs. 999, 1000, 1003, 1010, cited *supra*), and the immunity given thereby. The Federal statute gave it a *right* to appeal to this Court to redress a wrong, provided its conditions and requirements were complied with. No precedent can be found in the jurisprudence of this country where any state judge (except Justice Porter) or state court has ever attempted, by judicial construction or otherwise, to write into the Federal Judiciary Act any condition or requirement not placed there by Congress. "This Constitution, and the laws made in pursuance thereof, * * * shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding," says the Constitution of the United States.

Justice Porter says that (Rec., p. 268) :

"The Judiciary Act. (Rev. Stat. U. S.) was not intended to affect and does not affect the jurisdiction of this Court," even though all of its requirements and conditions are complied with. He writes into the Federal Judiciary Act, by construction, that if a *Railway Company* seeks to review in this Court a judgment of the state court in a *mandamus* case, brought to enforce a *private* right, and does not succeed in such review, it shall be *punished* for its temerity, by being compelled to pay whatever attorneys' fees the attorneys for the defendant in error can induce a commissioner to allow them, whether paid by the defendant in error or not (and even though such defendant in error is not legally liable therefor), including railroad fare, Pullman sleeping car fare, hotel bills, "*incidentals*," etc., which Justice Porter says (Rec., p. 269) "are the injuries sustained as the *natural* and *probable* consequences of the *wrongful* refusal to comply, and the expenses reasonably and necessarily incurred in compelling compliance with the *alternative writ*." Was the Railway Company guilty of any *wrong* when it instituted a proceeding in this Court to get rid of what it, in good faith, conceived to be an unjust judgment of the state court—a judgment which two of the Justices of this Court (211 U. S. 612) said was not within the jurisdiction of the state court? No fraud, malice or oppression is charged against the Railway Company in its attempt to have this Court review and reverse the judgment of the state court. In its proceedings it exercised a *right* secured to it by the Federal Constitution and the laws passed in pursuance thereof.

This Court has said, in *Felix v. Schanneber*, 125 U. S. 54, that:

"In allowing a writ of error from this Court to the highest court of a state, and in issuing a citation, the Chief Justice of that court *does but exercise an authority*

vested by Congress in him, concurrently with each of the Justices of this Court."

Justice Porter, however, denies this, and affirms the law to be that (Rec., p. 274) :

"The taking of the bond, and the supersedeas itself, insofar as it can be conceived of as a substantial act, was the action of the Supreme Court of Kansas."

And thereon concludes that, notwithstanding the proceedings in error, the jurisdiction of the state court "*continues unabated.*" This Court, however, decided, in the case of *Keyser v. Farr*, 105 U. S. 265, 266, that:

"After the acceptance of the bond for the appeal, and the docketing of the cause in this Court, the jurisdiction of the court below was gone."

Draper v. Davis, 102 U. S. 370.

Slaughter House Cases, 10 Wall. (U. S.) 273.

If the construction of the Federal Judiciary Acts made by the state court in this case is correct, the valuable *right* heretofore supposed to have been given by those Acts may be absolutely nullified by a state Legislature, or by the whim or caprice or oppression of any state court. The Railway Company invoked a plain and simple remedy, under the Federal Judiciary Act, to review the judgment of the state court, and under a statute of Congress which provides that where, upon a writ of error from this Court, the judgment is affirmed, this "*Court shall adjudge to the respondents in error just damages for his delay, etc.*"

In the case of *Amory v. Amory*, 91 U. S. 356, it was said that:

"The court will not hesitate to exercise its power to adjudge damages where it finds that its jurisdiction has been invoked merely to gain time."

These statutes of Congress and the decisions of this Court were ignored and disregarded, and when the mandate of this Court was filed in the state court the Railway Company was confronted with a claim and demand for over \$79,000 attorneys' fees *as damages for* having exercised a *lawful* right, under an Act of Congress, and the exercise of such *lawful* right was converted into an actionable *wrong*, for which it must respond, *upon the pretense* that, while its writ of error was pending in this Court, the state court retained jurisdiction, and the Railway Company should be punished "*as a deterrent to others. This is what the state law is,*" so say counsel for the Mill Company. (Brief, p. 38.)

If this is law, few litigants will have the courage to invoke the aid of this Court to correct an unjust judgment of a state court. They had better "bear the ills they have, rather than fly to others they know not of."

(FOR A FULL DISCUSSION OF THIS ASSIGNMENT OF ERROR, THE ATTENTION OF THE COURT IS INVITED TO BRIEF OF PLAINTIFF IN ERROR ON THE MERITS, pp. 49-81 inclusive.)

The learned counsel for defendants in error, as before stated, base their application to dismiss or affirm upon the proposition that no Federal question is involved. As has been hereinbefore shown, at every step in the proceedings before the Commissioner, and before the court after the Commissioner had made his report to the court, and the matter was being considered on a motion to confirm such report, and after the decision of the court on the merits, by a petition for rehearing the Railway Company challenged the jurisdiction of the court to render any judgment against the Company for attorneys' fees, expenses, etc., and insisted that it had immunity from such allowance under the Federal Judiciary Act, all of which was denied and overruled by the court.

"The denial of the asserted right was a denial of a right or title specially claimed under a law of the United States."

Rector v. City Deposit Bank, 200 U. S. 411.

In the case of *Schlemmer v. Buffalo, etc., Ry. Co.*, 220 U. S. 593, it was said:

"As the alleged right to recover was under a Federal statute, alleged to have been improperly construed against the plaintiff in error, the case presented a claim of Federal right, a denial of which was reviewable here, and the case, for the reason stated, was reversed by this Court and sent back for further proceedings, in conformity with the opinion of this Court."

In the case of *Acme Harv. Co. v. Beekman Lumber Co.*, 222 U. S. 300, it was said that:

"Where the state court bases its jurisdiction entirely on the construction given a Federal statute by it adversely to contention of plaintiff in error, this Court has jurisdiction to review the judgment."

It would seem that this decision ought to settle this controversy, so far as the motion of defendant in error is concerned to dismiss or affirm, because the state court, only by reason of its construction of the Federal Judiciary Act, could have retained jurisdiction to render judgment which it did, and which is now sought to be reviewed and reversed.

In the case of *Graham v. Gill*, 223 U. S. 644-645, the Court said:

"It is insisted that the writ of error should be dismissed because no Federal question is involved. The contention, however, is without merit, since repeatedly during the trial the plaintiffs objected to the admission of all

evidence bearing upon the location of the tract in controversy other than the field notes of the survey under which the plaintiffs claimed, which it was contended were the best and only evidence. In passing adversely on these objections the trial court did not merely determine the weight of sufficiency of the evidence to prove a fact, but passed on the competency and legal effect of the evidence as bearing upon the question of Federal law, viz., the effect of the requirements of Sec. 2396, Rev. Stat., as to the mode of surveying public lands. Thus a Federal question was presented and decided. *Dower v. Richards*, 151 U. S. 658. See also *French-Glenn Live Stock Co. v. Springer*, 185 U. S. 47-54."

In the case of *Gaar, Scott & Co. v. Shannon*, 223 U. S. 468, it was said:

"Where a Federal question was properly presented, and necessarily controls the determination of the case, this Court has jurisdiction even if the decision is put by the state court upon some matter of local law. *West. Chicago R. R. v. Chicago*, 201 U. S. 506."

Ferris v. Frohman, 223 U. S. 424.

In the case of *Creswell v. K. of P.*, 225 U. S. 246, it was said:

"Where defendant sets up the claim that it enjoys right or privilege sought to be enjoined under authority of an Act of Congress, and the state court denies the right, the judgment is reviewable here under Section 237 of the new Judicial Code. (Sec. 709, Rev. Stat.)"

THIRD.

The third specification of error (Brief on Merits, p. 81) is as follows:

The Supreme Court of Kansas erred in refusing to enter judgment in accordance with the mandate of this Court, and in refusing to give full force and effect to such mandate, and in entering a different judgment against the plaintiff in error than it was authorized by said mandate to enter, and, in so doing, disregarded the Constitution and laws of the United States.

The mandate of this Court to the state court was merely an affirmance of the judgment of the Supreme Court of Kansas. It did not direct any further proceedings.

(The attention of this Court is invited to Brief on Merits filed herein, pp. 81-90, where this subject is discussed.)

FOURTH.

The fourth specification of error (Brief on Merits, p. 90) is as follows:

The said Supreme Court of Kansas erred in holding and deciding that the Act of Congress entitled "An Act to protect trade and commerce against unlawful restraint and monopolies" did not preclude the Mill Company from recovering herein, although a member of such unlawful combination.

Learned counsel for defendant in error (their Brief, p. 43) insist that:

"The plaintiff in error is bound in this proceeding by such finding of fact by the state court that it cannot relitigate it here, and that, under the writ of error prosecuted by it, this Court accepts as final the findings of fact as to that matter made by the state court."

The Court is referred to finding of fact made by the Commissioner, as follows (Rec., p. 41):

"I find that the Pacific Company's abstract of the evidence applicable to this question is a fair and full one, and it is adopted as the Commissioner's analysis of the evidence."

In the abstract thus found by the Commissioner to be correct, and adopted as his analysis of the evidence, will be found the following statement (Rec., pp. 193-194):

"The evidence of F. D. Larabee, F. S. Larabee and F. D. Stevens and the minutes of the proceedings of the Southern Kansas Millers' Commercial Club and of the Oklahoma and Texas Millers' Association, and the correspondence passing between the officers of the several associations and the several millers conclusively establishes the fact that prior to August 1, 1906, and down to January 1, 1909, and since said date, the Larabee Flour Mills Company, and each member thereof, belonged to an organization, of which the said F. D. Stevens was manager, for the purpose of creating and carrying out restrictions in trade and commerce, and aids to commerce, and to carry out restrictions in the value and free pursuit of the business and buying and selling grain, and the manufacture and sale of flour and meal by the members thereof, and belonging to such association, and for the purpose of increasing and reducing the price of merchandise, produce and commodities, and to prevent competition in the manufacture, making, transfer, sale and purchase of flour, wheat, grain and the products thereof, and to fix a standard or figure whereby the price to the public of wheat,

grain, flour and the products thereof should be controlled and established, and that they had entered into and belonged to a combination, as such partners, and the Larabee Flour Mills Company, under a contract and agreement, express or implied, by which they bound themselves not to sell, manufacture, dispose of or transport any wheat, meal, grain or flour, or the products thereof, below a common, standard figure, and to preclude a free and unrestricted competition among themselves and others in the transfer, sale and manufacture of wheat, grain, flour and meal, in violation of the laws of the state of Kansas. And further shows and establishes the fact that the said Southern Kansas Millers' Commercial Club, of which the said Larabee Flour Mills Company, was a member, and F. D. Stevens, their agent and authorized officer, was its manager, had entered into a combination and conspiracy between the Oklahoma Millers' Association and the Texas Millers' Association, and the members thereof, in violation of the Sherman Anti-Trust Act, and for the purpose of fixing a standard of prices for wheat, flour and meal, and the products thereof, manufactured by the millers in such association. And such evidence further establishes the fact that the said Larabee Flour Mills Company operated its said mill at Stafford, Kansas, during the time covered by the subject matter of this controversy, from August 1, 1906, to July 1, 1907, and since said date, in combination with the millers in southern Kansas, for the purpose and with the intent and under an agreement and understanding that they would carry out restrictions in the purchase and manufacture of wheat, grain, flour and meal, and the products thereof, and would monopolize the business and prevent competition—all in violation of the laws of the state of Kansas and the Acts of Congress in such cases made and provided."

The Supreme Court of Kansas, in its opinion, does not make any finding of fact that the Mill Company was not a member of the association which was organized and in existence in violation of the Sherman Anti-Trust Act, but says (Rec., p. 275) :

"A large amount of evidence was taken which tended strongly to prove this charge, although it was not sufficient to satisfy the Commissioner that it had been established. It becomes unnecessary for us to weigh the evidence because of a further finding of the Commissioner, which appears to be supported by the evidence, that the performance of the switching service, which was the subject-matter of this action, was no part of the purpose of the organization of the Southern Kansas Millers' Commercial Club, and in no sense a part of or necessary to the carrying out of any of the purposes for which the club was organized."

In the case of *Rector v. City Deposit Bank*, 200 U. S. 405, it was said:

"While this Court is bound by the facts found by a state court, where that court does not find the facts, but instructs a verdict on the ground that the evidence justifies no other verdict, a question of law, reviewable by this Court, is raised as to whether the jury could have found otherwise under any reasonable view of the evidence."

In the case of *K. C. So. Ry. Co. v. Albers Comm. Co.*, 223 U. S. 573, it was said:

"On writ of error to the state court this Court may examine the entire record, including the evidence, to determine whether what purports to be a finding of fact is not so involved with and dependent upon questions of Federal law as to be really a decision thereof.

In this case the finding of the state court as to a rate charged by an interstate carrier necessarily involved the interpretation and construction of the Interstate Commerce Act, and this Court can examine the evidence and ascertain for itself the validity of the rate under the statute."

By an examination of the brief of plaintiff in error on the merits filed herein (Brief of Merits, pp. 90-108) it will be

found that this question is fully discussed, and reference made to the authorities in support of the contention of plaintiff in error that the Mill Company was not entitled to recover in this action because it was incontestibly true that its mill was operated, managed and controlled as an important and potential factor in carrying out the plans and purposes of the Millers' Association, which was being operated in plain violation, not only of the anti-trust laws of the state of Kansas, but of the Sherman Anti-Trust Act. The Commissioner, however, reached the conclusion, and that conclusion was affirmed by the state court, that, even though it be conceded that the contention of the Railway Company was correct, and that the Mill Company was engaged in the violation of the law, both of the state and of the Sherman Anti-Trust Act, it should recover whatever damages it had sustained by reason of the interruption of this unlawful business, by reason of the neglect of the Railway Company to do the switching from its line to the line of the Santa Fe Railway Company.

This Court cannot fail to reach the conclusion, by a most cursory examination of the evidence on this subject, all of which is contained in the record (pp. 168-194), that the Mill Company was not only a member of the association organized in violation of law, but that it was using its mill, and the product thereof, as an instrumentality to carry out the purposes of the conspiracy; and, as conclusive proof of this, the attention of the Court is invited to the testimony of F. S. Larabee (Rec., pp. 191-192) and to the letters of the Larabee Company, wherein they specifically state what they propose to do with their mill unless the purposes and intention of the association are carried out.

In one letter the Mill Company says (Rec., p. 192):

"We have decided the only thing for us to do to protect our trade is to get right after the price cutters, and

do it up brown. Will say this is not our low note. We will make another cut in a few days, if we do not get enough business from the first one. We can easily see 20 cents more reduction, if we find it necessary. * * *

It is easy enough for some of the price cutters to step over and swipe some of our trade and immediately hop back on the reservation and say they will be good. What we want is some assurance those people will be good all the time, and until we feel satisfied such is the case we are not going to be good ourselves."

Yet, in the face of these letters and the letters written by Mr. Stevens, the general manager and agent of the Mill Company, the Commissioner and the state court reached the conclusion that the mill was not being used as an instrumentality to prevent competition between the millers of Kansas, Oklahoma and Texas. The letters of Stevens, general manager of the Millers' Association (Rec., pp. 171-172), clearly show the power of the mills in the territory controlled by that association. In one letter, speaking of the Texas millers, he states (Rec., p. 172) :

"These people are in earnest. They came to Wichita instructed to demand of the Kansas mills fair business treatment. They are ready, willing and anxious to work with the Kansas mills for the general good of the milling industry of the Southwest, *and would regret to resort to retaliatory measures.*"

Again, he writes (Rec., p. 176) :

"Some of the Texas mills are bidding very high prices yet, but I hope that we will soon get things lined up. We will be all right at this end, and if you will advise me the names of all the mills cutting prices on flour I will go after them."

(See also Rec., pp. 183-184-185.)

Is it possible that the Court will lend its assistance to such public malefactors as this Mill Company has shown itself to be, or as it is shown by the evidence to have been in the operation of its milling business at Stafford?

The Supreme Court of Kansas has well said, in the case of *Sheldon v. Pruessner*, 52 Kan. 589—speaking of the illegality of a transaction which was not specially pleaded in the answer of the defendant—that the courts, “in the due administration of justice, will not enforce a contract in violation of law, nor permit a plaintiff to recover upon a transaction against public policy, even if the invalidity of the contract or transaction be not specially pleaded.”

(For a full discussion of this question, see Brief on Merits, pp. 90-108, to which the attention of the Court is specially invited.)

Again, the attention of the Court is called to Section 5146, General Statutes 1909, Kansas, which provides:

“Every person, company or corporation within or without this state, their officers, agents, representatives or consignees, violating any of the provisions of this Act within this state, are hereby denied the right and are hereby prohibited from doing any business within this state, and all persons, companies and corporations, their officers, agents, representatives and consignees within this state, are hereby denied the right to handle the goods of or in any manner deal with, directly or indirectly, any such person, company or corporation, their officers, agents, representatives or consignees.”

FIFTH.

The fifth specification of error (Brief on Merits, p. 109) is as follows:

The said Supreme Court of Kansas was without any jurisdiction to render judgment against this defendant for any amount, and, in assuming to render such judgment, deprived this defendant of its property without due process of law, and denied to it the equal protection of the law.

The attention of the Court is here invited to a discussion of this question in Brief on Merits filed herein (pp. 109-122).

Conclusion.

The plaintiff in error respectfully submits that the motion of defendant in error to dismiss the writ of error or affirm should be overruled, and, in view of the want of jurisdiction in the state court, to render the judgment which was rendered, and in view of the fact that it is clearly demonstrated that the whole claim and demand of the Mill Company in that court for damages was based upon a clear and palpable violation of the anti-trust laws of the state of Kansas and the Sherman Anti-Trust Act, that this Court should, without further argument, reverse the judgment of the court below and order a dismissal of all the proceedings therein.

B. P. WAGGENER,

Attorney for Plaintiff in Error.

18
No. 135.

Office Supreme Court.

FILED

DEC 10 1913

JAMES D. MAHE

CL

In the
Supreme Court of the United States

October Term, 1911.

THE MISSOURI PACIFIC RAILWAY COMPANY, *Plaintiff in Error,*

VS.

THE LARABEE FLOUR MILLS COMPANY, *Defendant in Error.*

SUPPLEMENTAL BRIEF.

B. P. WAGGENER,
Attorney for Plaintiff in Error.

SUBJECT INDEX.

	PAGE
Brief and argument on the proposition that the said Supreme Court of Kansas was without any jurisdiction to render judgment against this defendant for any amount, and in assuming to render such judgment, deprived this defendant of its property without due process of law, and denied to it the equal protection of the law.....	1-25, 28-31
That the decision of the Supreme Court of the United States in the case of Mo. Pac. Ry. Co. v. Larabee Mill Co., 211 U. S. 612, is not necessarily the law of the case, so far as this branch is concerned.....	26-27

Table of Cases Cited.

Armour Packing Co. v. U. S., 209 U. S. 56-86.....	3-12-16-30
Atlantic Coast Line v. Wharton, 207 U. S. 334.....	3
B. & O. R. R. Co. v. Pitcairn Coal Co., 215 U. S. 481..	26
Bowman v. Ry. Co., 125 U. S. 490.....	29
Brennan v. Titusville, 153 U. S. 300-303.....	30
Brown v. Houston, 114 U. S. 632.....	29
Brown v. Maryland, 12 Wheat. 419.....	29
Cooley v. Board, 12 How. (U. S.) 299.....	29
Covington v. Kentucky, 154 U. S. 209-223.....	30
C. R. I. & P. R. R. Co. v. Harwick Elev. Co., 226 U. S. 433.....	19-24-27
Fargo v. Mich., 121 U. S. 245-247.....	29
Gloucester Ferry Co. v. Penn., 114 U. S. 204.....	29
Gulf Ry. Co. v. Hepley, 158 U. S. 104.....	29-30
Hall v. DeCuir, 95 U. S. 488.....	8-29
Henderson v. Mayer, 92 U. S. 271.....	29
In re Lottery Case, 188 U. S. 358.....	30
In re Raher, 140 U. S. 555.....	30
Inter. Com. v. Brinson, 154 U. S. 470.....	30
Inter. Co. v. Goodrich Transit Co., 224 U. S. 207.....	30
Johnson v. S. P., 196 U. S. 21-22.....	30
Kelly v. Rhoads, 188 U. S. 5-10.....	30

INDEX—Continued.

	PAGE
Leisy v. Hardin, 135 U. S. 107-125.....	29-30
McCall v. Calif., 136 U. S. 108.....	30
McNeil v. South. Ry. Co., 202 U. S. 558.....	8-9-16-30
Messenger v. Anderson, 225 U. S. 436.....	26
Mobile v. Kimball, 102 U. S. 702.....	29
Mo. Pac. Ry. Co. v. Larabee Mill Co., 211 U. S. 612-627	1-15-17-26-27-28
Nor. Pac. R. R. Co. v. Washington, 222 U. S. 370.....	17
N. Y. Central v. Hudson Co., 227 U. S. 249.....	23-27-28
N. Y., N. H. & H. R. R. Co. v. Inter. Comm., 200 U. S. 392.....	10
Oklahoma v. Ks. Natl. Gas Co., 221 U. S. 230.....	16
Pickard v. Pullman Co., 117 U. S. 49.....	29
Rhodes v. Iowa, 170 U. S. 412-425.....	30
Robbins v. Shelly, 120 U. S. 494.....	29
R. R. Co. v. Eubanks, 184 U. S. 38-43.....	30
R. R. v. Fuller, 18 Wall. 568.....	29
R. R. Co. v. Hanson, 95 U. S. 469.....	29
Ry. Co. v. Seale, 229 U. S. 156.....	23
Schemmer v. Ry. Co., 205 U. S. 1.....	30
Scranton v. Wheeler, 179 U. S. 160.....	30
Sherlock v. Alling, 93 U. S. 103.....	29
So. Pac. Ry. Co. v. Burlington Lumber Co., 225 U. S. 99-100.....	19
So. Pac. Term. Co. v. Int. Comm. Com., 219 U. S. 498- 527.....	16
So. Ry. Co. v. Reid, 222 U. S. 424.....	16-17-19-27
St. L. I. M. & S. R. R. v. Edwards, 227 U. S. 268.....	24-27
Stockyards v. Ry. Co., 192 U. S. 568.....	30
Stoutenburgh v. Hennick, 129 U. S. 148.....	30
Sturges v. Crowninshield, 4 Wheat. 122.....	29
Tex. & Pac. Co. v. Abilene Co., 204 U. S. 430-448.....	5-26-30
Tex. & Pac. Co. v. Interstate, etc., 162 U. S. 197.....	10
U. S. v. Knight, 156 U. S. 11-12.....	30
U. S. v. Union Stock Yards Co., 226 U. S. 286.....	21
Wabash v. Illinois, 118 U. S. 569-577.....	29
Walling v. Michigan, 116 U. S. 455.....	29
Welton v. State, 91 U. S. 281.....	29
Wilson v. Blackbird, 2 Pet. (U. S.) 245.....	29
Yazoo, etc., Co. v. Greenwood, 227 U. S. 1.....	23-27

In the
Supreme Court of the United States
October Term, 1911.

THE MISSOURI PACIFIC RAILWAY COMPANY, *Plaintiff in Error*,

VS.

THE LARABEE FLOUR MILLS COMPANY, *Defendant in Error*.

No. 878.

SUPPLEMENTAL BRIEF.

"The said Supreme Court of Kansas was without any jurisdiction to render judgment against this defendant for any amount, and, in assuming to render such judgment, deprived this defendant of its property without due process of law, and denied to it the equal protection of the law."

The original controversy was before this Court and decided in *Missouri Pacific Railway Company v. The Larabee Flour Mills Company*, 211 U. S. 612-627. In that decision this Court affirmed the power of the state court to issue the writ of mandamus, and, in the opinion in that case, it was conceded by the Court (211 U. S. 620) that:

"It appears from the findings that about three-fifths of the flour of the Mill Company is shipped out of the state, while the other two-fifths is shipped to points within the state." (See Second Finding of Fact, Trans., p. 2.)

The switching service was performed by the Missouri Pacific Railway Company *for* the Santa Fe Company, for which the Santa Fe Company paid the Missouri Pacific Company two dollars per car. (Finding of Fact No. 5, Trans., p. 4.) The proceedings in the court below, which we now seek to have reviewed and reversed, were instituted to penalize the Railway Company for damages, mostly accruing to the Mill Company, as alleged, after the final judgment of the state court had been superseded, and while pending in this Court.

The entire record shows, without conflict, that the switching service was performed by the Missouri Pacific Company *for* the Santa Fe Company. (Finding of Fact No. 5, Trans., p. 4.) The item of two dollars per car was a terminal charge against the Santa Fe Company, and, inasmuch as each the Missouri Pacific and Santa Fe were interstate carriers, and inasmuch as three-fifths of the entire volume of the Mill Company's business was interstate, and so intended in its inception, in the absence of evidence to the contrary, the presumption is that such terminal charges were filed with and approved by the Interstate Commerce Commission, and therefore the jurisdiction of the state court, at least as to such business, was withdrawn and excluded.

The Supreme Court of Kansas, by its judgment, has inflicted a penalty—and a most severe one—upon the Missouri Pacific Railway Company, not only for its neglect to perform an interstate switching service *for* the Santa Fe Company, but also because it invoked a remedy given it by the laws and statutes of the United States.

It is provided by the Hepburn Act that:

"The provisions of this section shall apply to all traffic transportation and facilities defined by this Act."

It is also provided by Section 6 that:

"No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares and charges upon which the same are transported by said carrier have been filed and published, in accordance with this Act."

For failure to comply with this requirement the carrier "shall be subject to a fine of not less than one thousand dollars nor more than twenty thousand dollars for each offense."

It being admitted and conceded that each the Missouri Pacific and Santa Fe were interstate carriers, and that three-fifths of the business of the Mill Company handled and to be transported by these carriers was interstate, the presumption is that each had complied with the requirements of the Acts of Congress.

If, therefore, the Railway Company must obey the mandate of the state court and, at the same time, must comply with the requirements of the Act of Congress, is it not subjected to a joint regulation by the state and Federal governments at one and the same time?

We respectfully submit that, if this is a correct interpretation of the Act of Congress, it in effect overrules the recent decision of this Court in the case of *Armour Pkg. Co. v. U. S.*, 209 U. S. 56-86, and cannot be reconciled with the decision in the case of *Atlantic Coast Line v. Wharton*, 207 U. S. 334, in which it was said:

"That any exercise by state authority, in whatever form manifested, which directly regulates interstate commerce, is repugnant to commerce clause of the Constitution, is obvious."

The mandate of the state court required the Missouri Pacific Railway Company to handle and move a large volume of interstate freight, upon the "payment of the heretofore customary charges," without any finding of fact showing, or tending to show, that the "heretofore customary charges" had been filed with the Interstate Commerce Commission, as a condition precedent to its "engaging or participating" in the transportation of such property, as specifically required by the Act of Congress (Section 6).

If it should appear or be presumed that it had complied with the Act—being an interstate carrier—and that it was guilty of discrimination against the Mill Company, the exclusive remedy is provided by the Hepburn bill. It is provided by Section 3 of the Act that:

"It shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Again, it is provided by the same section that:

"Every common carrier subject to the provisions of this Act shall, according to their respective powers, afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding and delivering of passengers and property to and from their several lines, and those connecting therewith; and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."

Again, it is provided:

"That the Circuit Courts of the United States shall have jurisdiction upon the relation of any persons, firm or corporation alleging such violation by a common carrier of any of the provisions of the Act to which this is a supplement, and all the Acts amendatory thereof, as prevents the relator from having interstate traffic moved by said common carrier at the same rates as are charged, or upon the terms or conditions as favorable as those given by said common carrier for like traffic, under similar conditions, to any other shipper, to issue writ or writs of mandamus against said common carrier, commanding such common carrier to move and transport the traffic, or to furnish cars or other facilities for transportation for the party applying for the writ," etc.

In view of the most comprehensive Act of Congress prescribing the duties of the carrier, providing the remedy and designating the tribunal to enforce the remedy, we submit that the state court was without jurisdiction. When a right is given by statute, and a specific remedy is provided, or new power, and also the means of execution, the power can be executed, and the right vindicated, in no other way than that prescribed in the Act.

Speaking of the Interstate Commerce Act, Mr. Justice White, in the case of *Tex. & Pac. Co. v. Abilene Co.*, 204 U. S. 430-448, said:

"The Act made it the duty of carriers subject to its provisions to charge only just and reasonable rates. To that end the duty was imposed of establishing and publishing schedules of such rates. It forbade all unjust preferences and discriminations, made it unlawful to depart from the rates in the established schedules until the same were changed as authorized by the Act, and such departure was made an offense punishable by fine or imprisonment, or both, and the prohibitions of the Act and the punishments which it imposed were directed not only against carriers, but against shippers, or any person who,

directly or indirectly, by any machination or device in any manner whatsoever, accomplished the result of producing the wrongful discriminations or preferences which the Act forbade. It was made the duty of carriers subject to the Act to file with the Interstate Commerce Commission, created by that Act, copies of established schedules, and power was conferred upon that body to provide as to the form of the schedules, and penalties were imposed for not establishing and filing the required schedules. The Commission was endowed with plenary administrative power to supervise the conduct of carriers, to investigate their affairs, their accounts and their methods of dealing, and generally to enforce the provisions of the Act. To that end it was made the duty of the district attorneys of the United States, under the direction of the attorney general, to prosecute proceedings commenced by the Commission to enforce compliance with the Act. The Act specially provided that whenever any common carrier subject to its provisions 'shall do, cause to be done, or permit to be done, any act, matter or thing in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter or thing in this Act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this Act. * * *' Power was conferred upon the Commission to hear complaints concerning violations of the Act, to investigate the same, and, if the complaints were well founded, to direct not only the making of reparation to the injured persons, but to order the carrier to desist from such violation in the future. In the event of the failure of a carrier to obey the order of the Commission, that body, or the party in whose favor an award of reparation was made, was empowered to compel compliance by invoking the authority of the courts of the United States in the manner pointed out in the statute, *prima facie* effect in such courts being given to the findings of fact made by the Commission. By the ninth section of the Act it was provided that:

'Any person or persons claiming to be damaged by any common carrier subject to the provisions of this Act may either make complaint to the Commission, as hereinafter provided for, or may bring suit in his or their

own behalf, for the recovery of the damages for which such carrier may be liable under the provisions of this Act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt.'
* * *

That the Act to regulate commerce was intended to afford an effective means for redressing the wrongs resulting from unjust discrimination and undue preference is undoubted. Indeed, it is not open to controversy that to provide for these subjects was among the principal purposes of the Act. *Interstate Commerce Commission v. Cincinnati, N. O. & Tex. Pac. Ry. Co.*, 167 U. S. 479, 494. And it is apparent that the means by which these great purposes were to be accomplished was the placing upon all carriers the positive duty of establishing schedules of reasonable rates which should have a uniform application to all, and which should not be departed from so long as the established schedule remained unaltered in the manner provided by law. *Cin., N. O. & Tex. Pac. Ry. Co. v. Interstate Commerce Comm.*, 162 U. S. 184; *Interstate Commerce Comm. v. Cincinnati, N. O. & Tex. Pac. Ry. Co.*, 167 U. S. 479."

We call the especial attention of the Court to the conclusion of Mr. Justice White, speaking for the Court, that:

"That the Act to regulate commerce was intended to afford an effective means for redressing the wrongs resulting from unjust discriminations and undue preference is undoubted. Indeed, it is not open to controversy that to provide for these subjects was among the principal purposes of the Act."

Again, it was said, referring to that part of Section 22 of the Act to Regulate Commerce, that:

"Nothing in the Act contained shall in any way abridge or alter the remedies now existing at common

law or by statute, but the provisions of this Act are in addition to such remedies'; that "this clause, however, cannot in reason be construed as continuing in shippers a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the Act. In other words, the Act cannot be held to destroy itself."

While it is true, in the McNeil case, that the freight was being brought into the state, and in the case at bar the freight was from a point within to a point without the state, that seems to be the *only* dissimilarity. This court said, in the case of *Hall v. DeCuir*, 95 U. S. 488, that the act applied to "*the business as it comes into the state from without, or goes out from within.*"

For the purpose of making our contention plainer, we copy from the McNeil case, viz.:

"Viewing the order which is under consideration in this case as an assertion by the corporation commission of its general power to direct carriers engaged in interstate commerce to deliver all cars containing such commerce beyond their right of way, and to a private siding, the order manifestly imposed a burden so direct and so onerous as to leave no room for question that it was a regulation of interstate commerce. On the other hand, treating the order as but the assertion of the power of the corporation commission to so direct in a particular case in favor of a given person or corporation, the order not only was in its very nature a direct burden and regulation of interstate commerce, but also asserted a power concerning a subject directly covered by the Act of Congress to regulate commerce, and the amendments to that act, which forbid and provide remedies to prevent unjust discrimination, and the subjecting to undue disadvantage by carriers engaged in interstate commerce."

There it is said that the order complained of "asserted a power concerning a subject directly covered by the Act of

Congress to regulate commerce, and the amendments to that act, which forbid and provide remedies to prevent unjust discriminations, and the subjecting to undue disadvantage by carriers engaged in interstate commerce," and such order was by this Court held void. In the case at bar, it is found as a *fact*—which finding is unchallenged—that three-fifths of *all* of the business controlled and regulated by the order and mandate of the court is interstate. Does not the decision of this Court in the McNeil case absolutely control it when the Court said that:

"Viewing the order which is under consideration in this case as an assertion by the corporation commission of its general power to direct carriers engaged in interstate commerce to deliver all cars containing such commerce beyond their right of way, and to a private siding, the order manifestly imposed a burden so direct and so onerous as to leave no room for question that it was a regulation of interstate commerce."

In the case at bar, is not the order and mandate of the state court an assertion on its part of its power to require the Missouri Pacific Railway Company to move a large volume of interstate business from the mill over its own rails, and onto the rails and right-of-way of a competitive carrier? It seems to us that the fact that the freight was "going out" instead of "coming in" cannot destroy the analogy between the case at bar and the McNeil case, *supra*. In the McNeil case, *supra*, Mr. Justice White, speaking for the Court, said:

"The order not only was in its very nature a burden and regulation of interstate commerce, but also asserted a power concerning a subject directly covered by the Act of Congress to regulate commerce, and the amendments to that act, *which forbid and provide remedies to prevent unjust discrimination*, and the subjecting to undue disadvantage by carriers engaged in interstate commerce."

In the recent case of *N. Y., N. H. & H. R. R. Co. v. Interstate Com.*, 200 U. S. 392, Mr. Justice White said:

"That a carrier engaged in interstate commerce becomes subject, as to such commerce, to the commands of the statute, and may not set its provisions at naught, *whatever otherwise may be its power when carrying on commerce not interstate in character, cannot in reason be denied.*"

This Court, in the case of *Tex. & Pac. Ry. Co. v. Interstate, etc.*, 162 U. S. 197, said:

"The purpose of Congress to embrace the whole field of interstate commerce is made apparent by the exclusion only of *wholly* domestic commerce in the last clause of section one of the original Act of 1887, and in the declaration of the scope and purpose of the act, as declared in its title."

Has not Congress, by the proviso to section one of the Act, already determined that the provisions of the act shall apply to all commerce and transportation by a railroad common carrier, except that which is "*wholly* within one state"? Are there any words in the English language which could have been used which would have made the purpose and intention of Congress any plainer? Congress did not say that the act should not apply to commerce or transportation when "*any part* of it was within one state," but only when it was "*wholly* within one state." The mandate of the state court did not apply to one car, or a class of cars, but to a volume of business, "aggregating about one and one-half millions of dollars of such business for the year" (Rec., p. 1); "three-fifths of which (product or business) is so shipped out of the state of Kansas, and into other states." (Rec., p. 18.)

But let us apply another test. Suppose the Missouri Pacific Company should be indicted for moving or handling

the Mill Company's business in the manner in which it was moved and handled, and for charging and receiving from the Mill Company two dollars per car for such service, and it appeared on the trial that three-fifths of the volume of that business was from the mill in Kansas "into other states," and it had not filed its schedule of such charges with the Commission, as required by the Act of Congress (Section 6). What defense could it interpose to the requirement of the act that: "No carrier, unless otherwise provided by this act, shall engage or *participate* in the transportation of * * * property, as defined in this act, unless the rates, fares and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this act?"

Again, it is provided by the Elkins Act (Section one) as amended June 29th, 1906, that:

"The wilful failure upon the part of any carrier subject to said acts to file and publish the tariffs or rates *and charges*, as required by said acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and, upon conviction thereof, the corporation offending shall be subject to a fine of not less than one thousand dollars nor more than twenty thousand dollars, for each offense, etc."

Would it be any defense for a violation of this act for the Missouri Pacific to plead that this entire business "had not been appropriated to interstate commerce," and was "subject to state control," in the face of the conceded fact that three-fifths of the entire product of the mill was "shipped out of the state of Kansas, and into other states," when this was a "typical, constantly recurring course," and "the current thus existing" was a "current of commerce among the states?"

Suppose the Missouri Pacific should enter into a secret agreement with the Mill Company that, while it charged two dollars per car for handling and moving this large volume of business, it would, at stated periods, rebate one dollar per car to the Mill Company. Would not each, the Missouri Pacific and the Mill Company, be guilty of a violation of that part of section one of the Elkins Act which provides that:

"It shall be unlawful for any person, persons or corporation to offer, grant or give, or to solicit, accept or receive any rebate, concession or discrimination in respect to the transportation of any property in interstate or foreign commerce, by any common carrier subject to said act to regulate commerce, and the acts amendatory thereof, whereby any such property shall, by any device whatever, be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said act to regulate commerce, and the acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced, etc."

In the case of *Armour Pkg. Co. v. U. S.*, 209 U. S. 81, it was said by Mr. Justice Day that:

"In the Elkins Act, Congress has made it a penal offense to give or receive transportation at less than the published rate. This rate can only be raised by ten days' notice or lowered by three days' notice. (Sec. 625, Stat. 855.) There is no provision excepting special contract from the operation of the law. One rate is to be charged, and that the one fixed and published in the manner pointed out in the statute, and subject to change in the only way open by the statute."

Speaking of the feature of the statute relative to transportation, it was said (209 U. S. 74):

"The transportation being of the essence of the offense, when it takes place, whether in one district or

another, *whether at the beginning*, at the end or in the middle of the journey, it is equally and at all times committed."

To secure this business, the Santa Fe employed the Missouri Pacific, as its agent, and paid the Missouri Pacific two dollars per car for the service. "In no instance did the Missouri Pacific issue bills of lading, way bill, or receipt, or present or collect bills for freight or switching charges." (Rec., p. 20.) "It relied upon the implied contract of the Santa Fe to pay the value of the service performed." (Rec., p. 38.) Under this arrangement, when, as a matter of law, were the cars intended for interstate shipment delivered by the Mill Company to the Santa Fe? We insist at the mill, when loaded and taken possession of by the Missouri Pacific. From that point they had started on their interstate journey, and were being transported by the Santa Fe, within the meaning of the Interstate Commerce Act. True, the cars, for a mile, were hauled by a Missouri Pacific engine, on Missouri Pacific rails, but that service was engaged and paid for by the Santa Fe, and not the Mill Company. The car was then on its journey. Indeed, it is alleged in the application for the writ (Rec., p. 2) that the service was necessary "to complete the shipment or journey" over the Santa Fe. The two dollars per car paid by the Santa Fe to the Missouri Pacific for this service was necessarily a terminal charge, which should under section six of the Commerce Act, be added to the freight rate, as a part of "the value of the service rendered" by the Santa Fe for the Mill Company.

For the purpose of argument, let us suppose that this charge of the Santa Fe against the Mill Company was not filed with the Interstate Commerce Commission. How could the Santa Fe escape conviction for a violation of section six of the act? How could it escape conviction for violation of

section one of the Elkins Act, as amended June 29th, 1906? Would it be a good defense for it to show that two-fifths of the entire volume of business involved was intrastate, and, although three-fifths was conceded to be interstate, inasmuch as the Interstate Commerce Commission had not acted, the operation of the Federal statute was suspended? Would it be good defense for it to plead that the act to regulate commerce and the Elkins Act did not apply until the cars intended for interstate shipment were placed on the transfer track, and in fact billed to destination? Under the facts disclosed by the record, could it be heard to say that it did not *participate* in the transportation, although it had paid two dollars per car to have them so placed? We respectfully submit that to pay the charge of two dollars per car for the business, without filing same with the Commission, would be a clear violation of the act; that to collect the same from the Mill Company, without so filing, would be a violation of the law—as would also a failure to collect it. It follows, therefore, necessarily, that the mandate of the state court, which requires or permits either of said railroad companies to “*participate*” in the transportation of said business, in violation of the Federal statute, is void, and the court without jurisdiction to make it.

In order that the Court may not misunderstand our contention, we will again state our proposition, viz.: that the state court was without jurisdiction to render a money judgment against the railway company—for the reasons:

First. It is conceded that three-fifths of all the business of the Mill Company regulated and controlled by the original mandate of the state court was interstate.

Second. That the sole foundation of the judgment of the state court sought to be reviewed was section 5193, Genl. Stat. of Kansas, 1901 (being sec. 723, chap. 182, Laws of Kansas 1909), which reads as follows:

"If judgment be given for the plaintiff, he shall recover the damages which he shall have sustained, to be ascertained by the court or jury, or by referee, as in a civil action, and costs; and a peremptory writ of mandamus shall also be granted to him without delay."

Third. That in entertaining jurisdiction to render judgment the state court acted without power, and in direct conflict with the commerce clause of the Constitution of the United States and the acts of Congress in pursuance thereof.

It is true that the judgment of the state court awarding the peremptory writ of mandamus was affirmed by this court (*Mo. Pac. Ry. Co. v. Larabee Flour Mills Co.*, 211 U. S. 612). That decision established the duty of the railway company to furnish the transfer service.

This is a proceeding growing out of that controversy, to recover damages resulting from a suspension of that service, and damages for attorneys' fees, etc., which accrued almost entirely *after* the final judgment of the state court on December 8th, 1906. (Trans., pp. 22-42.) The duty declared by the state court, and affirmed by this Court (211 U. S. 612), and enjoined by the common law, to perform the service without discrimination, when it is conceded, as it was by this Court (211 U. S. 620) "that about three-fifths of the flour is shipped out of the state," over the rails of the Missouri Pacific and the Santa Fe companies (Finding No. 2, Trans., p. 2) was a duty clearly defined and prescribed by the Hepburn Act, and the amendments thereto, because each of the carriers (the Missouri Pacific and the Santa Fe) was not only an interstate carrier, but the transportation sought to be regulated by the state court was largely (three-fifths) interstate commerce; and unquestionably the Circuit Courts of the United States were clothed with jurisdiction in the premises.

The two railway companies being interstate carriers, and, in respect to the traffic sought to be regulated by the state court, engaged in interstate commerce, and, as such, under the control and jurisdiction of the Interstate Commerce Act, and liable for the penalties prescribed thereby—had the state court any power or jurisdiction to inflict any penalty for the disregard of any duty enjoined thereby, even though that duty had been ascertained and judicially determined by that court? Would the judgment in the state court be any defense to a criminal prosecution under the Act of Congress based upon the same facts?

In this connection we think it not improper to call the attention of this Court to the fact that the decision in the case of *Mo. Pac. Ry. Co. v. Larabee Mills Co.*, 211 U. S. 612 (decided by a divided court) has been impliedly, if not expressly, overruled in several cases, following the decision of this Court in *McNeil v. So. Ry. Co.*, 202 U. S. 543, and *So. Pac. Term. Co. v. Int. Comm. Com.*, 219 U. S. 498-527.

In the case of *Oklahoma v. Ks. Natl. Gas Co.*, 221 U. S. 230, it was held that:

"Inaction by Congress in regard to a subject of interstate commerce is a declaration of freedom from state interference."

In the case of *So. Ry. Co. v. Reid*, 222 U. S. 424, this Court announced the rule to be that:

"There are three degrees to which the state exercises power over commerce: First, exclusively; second, in the absence of legislation by Congress, until Congress does act; third, where Congress, having legislated, *the power of the state cannot operate at all.* * * * As between the Federal Government and the states, one authority must be paramount, and when it speaks *the other must be silent.*"

It was further stated by the Court (p. 438) that:

"The provisions of the (Hepburn) Act are directed at the abuses most to be feared, unreasonableness in the rates, and *discriminations* in service in the acceptance and delivery of freight, and in facilities furnished."

The court (p. 441) most emphatically disagreed with the proposition that "the statutory enforcement under penalty of the common law duty to accept freight 'whenever tendered' is *not* within the scope or terms of any act of Congress"; and held that such conclusion "would destroy absolutely Federal control until the freight was in the possession of the carrier"; and expressly held that in the term "transportation" Congress had included "*all* services in connection with the receipt * * * of property transported."

The foundation of this controversy was and is the failure of the Missouri Pacific Railway Company (an interstate carrier) to "switch cars, without discrimination against a disfavored shipper," to and from a connection with the Santa Fe Railway Company (Trans., p. 1)—another interstate carrier—engaged in the "transportation" of cars loaded with flour and mill products from the Larabee Mills to points in other states than Kansas. It is not questioned that such traffic was not "wholly domestic, but found as a fact, approved by the state court (Trans., p. 2, Finding No. 2), and affirmed by this Court (211 U. S. 620), that: "about three-fifths of the flour of the Mill Company is shipped out of the state."

Nor. Pac. R. R. Co. v. Washington, 222 U. S. 370.

Evidently, therefore, the commerce sought to be regulated by the state court was not "wholly" domestic. The "discrimination" condemned by the state court was a "discrimina-

tion" prohibited by the Hepburn Act, and the remedy invoked (mandamus) under the state statute was *specially* provided for by Congress.

It is provided by section three of the Hepburn Act that:

"Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding and delivering of passengers and property to and from their several lines, and those connected therewith, and shall not discriminate in their rates and charges between connecting lines; *but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business.*"

Also that:

"It shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

And the remedy is provided by section 23, as follows:

"That the Circuit Courts of the United States shall have jurisdiction upon the relation of any persons, firm or corporation alleging such violation by a common carrier of any of the provisions of the act to which this is a supplement, and all the acts amendatory thereof, as prevents the relator from having interstate traffic moved by said common carrier at the same rates as are charged, or upon the terms or conditions as favorable as those given by said common carrier for like traffic, under similar conditions, to any other shipper, to issue writ or writs of mandamus against said common carrier, com-

manding such common carrier to move and transport the traffic, or to furnish cars or other facilities for transportation for the party applying for the writ, etc."

And the specific penalties for "discrimination" and undue "preference" are prescribed by the Act of Congress.

Inter. Comm. Com. v. Goodrich Transit Co., 224 U. S. 207.

The case of *So. Pac. Ry. Co. v. Burlington Lumber Co.*, 225 U. S. 99-100, was "an action to recover penalties under a statute of North Carolina for refusal to receive goods for shipment"; and the court, in that case, approved the decision in

So. Ry. Co. v. Reid, 222 U. S. 424.

The case of *C. R. I. & P. R. R. Co. v. Hardwick Elev. Co.*, 226 U. S. 433, seems to be so conclusive in favor of our contention that we quote *in extenso* from the opinion of the Chief Justice as follows:

"The argument at bar has been primarily concerned with the question of the validity of the Minnesota statute, considered as having been enacted in the exercise of a power assumed to exist to legislate reasonably in the absence of action by Congress on the subject of the delivery when called for of cars to be used in interstate traffic. Thus counsel for the defendant in error urges the correctness of the action of the supreme court of Minnesota in sustaining the statute upon the hypothesis that Congress had not legislated on the subject and that the act was a reasonable exertion of the power of the state. On the contrary, on behalf of the railroad company, it is insisted that even upon the assumption that the state had power to deal with the subject for which the statute provides in the absence of legislation by Congress, the enactment is nevertheless void, since it but expresses a policy which by penalization, fines and forfeitures will substitute for a free and unrestrained flow of commerce a service favoring a particular locality and shippers within the confines of one state, to the disad-

vantage of others. We are not, however, called upon to test the merits of these conflicting contentions, since we are of the opinion that by the act of June 29th, 1906, 34 Stat. 584, c. 3591, known as the Hepburn Act, amendatory of the act to regulate commerce, Congress has legislated concerning the deliveries of cars in interstate commerce by carriers subject to the act.

In the original act to regulate commerce the term 'transportation' was declared to embrace all instrumentalities of shipment or carriage. By the Hepburn Act it was declared that the term transportation 'shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership, or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration, or icing, storage and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto.'

The purpose of Congress to specifically impose the duty upon a carrier in respect to the furnishing of cars for interstate traffic is of course by these provisions clearly declared. That Congress especially concerned itself with that subject is further shown by a proviso inserted to supplement one of the original acts imposing the duty under certain circumstances to furnish switch connections for interstate traffic, whereby it is specifically declared that the common carrier making such connection 'shall furnish cars for the movement of such traffic to the best of its ability, without discrimination in favor of or against any such shipper.' Not only is there then a specific duty imposed to furnish cars for interstate traffic upon reasonable request therefor, but other applicable sections of the act to regulate commerce give remedies for the violation of that duty. Thus, by article eight it is provided 'that in case any common carrier subject to the provisions of this act * * * shall omit to do any act, matter or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damage sustained

in consequence of any such violation of the provisions of this act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.' Further, by article nine, an election is given to either make complaint to the Interstate Commerce Commission, or to bring, in a designated court, an action for the recovery of damages, and by article ten it is made a criminal offense for an employe of a corporation carrier to 'wilfully omit or fail to do any act, matter or thing in this act required to be done.'

As legislation concerning the delivery of cars for the carriage of interstate traffic is clearly a matter of interstate commerce regulation, even if such subject was embraced within that class of powers concerning which the state had a right to exert its authority in the absence of legislation by Congress, it must follow in consequence of the action of Congress to which we have referred that the power of the state over the subject matter ceased to exist from the moment that Congress exerted its paramount and all-embracing authority over the subject. We say this because the elementary and long-settled doctrine is that there can be no divided authority over interstate commerce, and that the regulations of Congress on that subject are supreme. It results, therefore, that in a case where from the particular nature of certain subjects the state may exert authority until Congress acts under the assumption that Congress, by inaction, has tacitly authorized it to do so, action by Congress destroys the possibility of such assumption, since such action, when exerted, covers the whole field, and renders the state impotent to deal with the subject over which it had no inherent, but only permissive, powers. *So. Ry. Co. v. Reid*, 222 U. S. 424."

In the case of *U. S. v. Union Stock Yards*, 226 U. S. 286, it was said that:

"In view of the continuity of operation, manner of compensation for, and performance of, services in connection with interstate transportation, the Union Stock Yards & Transit Company and the Chicago Junction Railway Company are subject to the terms of the act to

regulate commerce, and must conform to its requirements in regard to filing tariffs, and also desist from unlawful discrimination to shippers.

The Interstate Commerce Act, as amended by the Elkins and Hepburn Acts, extends to all terminal facilities and instrumentalities.

Service that is performed wholly in one state is still subject to the Act to Regulate Commerce if it is a part of interstate commerce.

The duties of a common carrier in the transportation of live stock begin with their delivery to be loaded and end only after unloading and delivery, or offer of delivery, to the consignee. *Covington Stock Yards Co. v. Keith*, 139 U. S. 128.

The character of the service rendered in regard to carriers of interstate freight, and not the manner in which the goods are billed, determines whether the commerce is interstate or not; and so *held* that, although neither the Stock Yards Company nor the Junction Railway Company issue through bills of lading, still, as the goods handled are in transit from one state to another, both corporations are engaged in interstate commerce."

* * * * *

"The Interstate Commerce Act, as amended by the Hepburn Act, 34 Stat. 584, c. 3591, Sec. 1, applies to common carriers engaged in the transportation of persons or property from state to state wholly by railroad, and the term railroad is defined to include 'all switches, spurs, tracks and terminal facilities, of every kind, used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards and grounds used or necessary in the transportation or delivery of any of said property'; and transportation is defined to include 'cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, storage and handling of property transported.'

That the service is performed wholly in one state can make no difference if it is a part of interstate carriage. 'The transportation of live stock,' said this court

in *Covington Stock Yards Co. v. Keith*, 139 U. S. 128, 136, in treating of the duties of common carriers, irrespective of the Act to Regulate Commerce, 'begins with their delivery to the carrier to be loaded upon its cars, and ends only after the stock is unloaded and delivered, or offered to be delivered, to the consignee.' In this connection see *Coe v. Errol*, 116 U. S. 517; *So. Pac. Term. Co. v. Inter. Comm. Com.*, 219 U. S. 498."

In the case of *N. Y. Central R. R. Co. v. Hudson Co.*, 227 U. S. 249, it was said that:

"An assertion of power by Congress over a subject within its domain must be treated as coterminous with its authority over the subject, and leaves no element of the subject to control of the state.

The operation at one time of both the power of Congress and that of the state over a matter of interstate commerce is inconceivable; the execution of the greater power takes possession of the field, and leaves nothing upon which the lesser power can operate."

In the case of *Yazoo, etc., Co. v. Greenwood*, 227 U. S. 1, it was said that:

"Since Congress has acted, by passing the Hepburn Act of June 29th, 1906, in regard to delivery of cars for interstate shipments, all state legislation on that subject has been superseded. *C. R. I. & P. Ry. v. Hardwick Elev. Co.*, 226 U. S. 426."

Ry. Co. v. Scale, 229 U. S. 156.

In the concluding part of the opinion of the state court awarding peremptory writ of mandamus (*Trans.*, p. 12) it is stated that:

"The Court has authority to render judgment in favor of the plaintiff for any damage it has sustained. (*Genl. Stat. 1901, Sec. 5193.*)"

See stipulation as to objections and exceptions. (Trans., pp. 42-43.) The jurisdiction of the court was challenged at every step in the proceedings (Trans., pp. 45-6-7, 52), and such challenges uniformly denied.

Notwithstanding this Court affirmed the judgment of the state court awarding mandamus (211 U. S. 612), did the state court have any jurisdiction or authority to render any judgment *for damages* as a result of the Railway Company's refusal or neglect to handle cars and freight moving in the channels of interstate commerce, and its neglect to comply with the requirements of the Hepburn Act? If, as said by this Court in *C. R. I. & P. Ry. Co. v. Hardwick Elev. Co.*, 226 U. S. 426, *cited supra*:

"There can be no divided authority over interstate commerce,"

and that the "regulations of Congress on that subject are supreme," was not the state court in error when it announced that it "had authority to render judgment in favor of plaintiff for any damage it has sustained"? (Trans., p. 12.)

In the case of *S. L. I. M. & S. R. R. v. Edwards*, 227 U. S. 268, the court said that:

"The section under consideration was but intended to subject carriers to the penalties which the section provides because of a failure to make prompt delivery of freight on arrival at destination. As applied to interstate commerce, however, we think such penalties were not enforceable, because of a want of power in the state to impose them in view of the legislation of Congress existing at the time the alleged duty to give notice arose. Recently, in *C. R. I. & P. Ry. Co. v. Hardwick Farmers' Elev. Co.*, 226 U. S. 426, a regulation of the state of Minnesota enacted after the passage of the Hepburn Act, imposing penalties on carriers for failing on demand to furnish a supply of cars for the movement of interstate

traffic was held invalid because of the absence of power in a state in consequence of the Hepburn Act to provide for such penalties. While the case before us concerns the power of a state over the delivery of cars in consummation of an interstate shipment, we nevertheless think that the Hardwick case is controlling, because the legislation of Congress as clearly excludes the right of a state to penalize for failure to deliver interstate freight at the termination of an interstate shipment as it was found to prevent a state from penalizing for failure to furnish cars for the initiation of the movement of interstate traffic. This conclusion is necessary since the amendment to section one of the act to regulate commerce, by which a definition is given to the term transportation, and which in the Hardwick case was held to exclude the right of a state to penalize for the non-delivery of cars to initiate the movement of an interstate shipment, by its very terms embraces the obligation of a carrier to deliver to the consignee, and therefore by the same token excludes the right of a state to penalize on that subject. The provision of the Hepburn Act in question is copied in the margin.

We are referred in argument to no other provision of the act tending in the slightest degree to indicate that the duties which were united by the provisions of one section of the act were divorced by another, and were made therefore subject to the possibility of varying and, it may be, conflicting state penalties. On the contrary, in this instance, as in the one considered in the Hardwick case, the context of the act adds strength to the conviction produced by the definition of the first section, and therefore gives rise to the conviction that the context of the statute, not only as was held in the Hardwick case, excludes the right of a state to regulate by penalties or demurrage charges the obligation of furnishing the means of interstate transportation, but also excludes power in a state to impose penalties as a means of compelling the performance of the duty to promptly deliver in consummation of such transportation."

(Note in margin referred to above):

"* * * the term 'transportation' shall include cars and other vehicles and all instrumentalities and

facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto."

Tex. & Pac. R. R. Co. v. Abilene Cotton Co., 204 U. S. 426.

B. & O. R. R. Co. v. Pitcairn Coal Co., 215 U. S. 481.

The foregoing decisions of this Court incontestably establish one proposition, viz.: that the state court had no jurisdiction to penalize the Missouri Pacific Railway Company for its failure to move the cars of the Mill Company transporting interstate freight.

It will be said, however, that the decision of this Court in the case of *Mo. Pac. Ry. Co. v. Larabee Mill Co.*, 211 U. S. 612, is the law of this case, right or wrong. We recognize the correctness of that rule (except as modified by this Court) if our contention here cannot be differentiated from the facts made the basis of the rule established.

In the case of *Messenger v. Anderson*, 225 U. S. 436, this Court announced the rule to be that:

"In the absence of statute, the phrase 'law of the case,' as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to open what has been decided—not a limit to their power."

The decision of this Court (211 U. S. 612) merely affirmed the *right* of the state court to *judicially* determine the *duty* of the railway company—as a common law duty—to move the

cars, notwithstanding three-fifths of them were loaded with flour destined to points beyond the state. The proceeding of the state court which is now challenged is that in which that court entertained jurisdiction to ascertain and render judgment for the damages sustained by the Mill Company as a *penalty* for not moving cars in compliance with the command of the alternative writ, in addition to attorneys' fees, expenses, etc., in defending the proceedings in error in this Court. In other words, a proceeding to recover damages for undue preference and discrimination against the Mill Company prohibited by the Hepburn Act, at least as to three-fifths of *all* the business sought to be regulated and controlled by the mandate of the state court, conceded to be interstate commerce.

The judgment of the state court affirmed by this Court (211 U. S. 612) was that a peremptory writ of mandamus issue. The mandate of this Court to the state court was merely to the effect that the judgment of the state court was "affirmed." What was meant by this Court when it said when Congress has legislated "the power of the state cannot operate at all"? (222 U. S. 424.)

If, as said by this Court in the case of *Ry. Co. v. Hudson*, 227 U. S. 249, action by Congress "leaves no element of the subject to the control of the state," what jurisdiction or power did the state court have to penalize the railway company for discrimination against the Mill Company? If, as stated by this Court, "since Congress has acted by passing the Hepburn Act, * * * in regard to the *delivery* of cars for interstate shipment, all state legislation on that subject has been superseded" (227 U. S. 1), what power has a state court to do that which the legislature might not do? What did this Court mean when it said that "there can be no divided authority over interstate commerce"? (226 U. S. 426.)

In the Edwards case, cited *supra*, it was held (227 U. S. 268)—approving the Hardwick case—that the Hepburn Act

"excludes the right of the state to regulate, by *penalties* or *demurrage* charges, the obligations of furnishing the means of interstate transportation, but also excludes *power* in a state to impose penalties as a means of compelling the performance of the duty to promptly deliver in consummation of such transportation."

How is it possible to reconcile the rule and principle of these decisions with the power and authority exercised by the state court? Was not its every act tantamount to usurpation? If the Hepburn Act "covers the whole field, and renders the state impotent to deal with a subject over which it had no inherent, but only permissive, power" (226 U. S. 433), what power had the state court to entertain a claim for damages for discrimination, even though it had the power (211 U. S. 612) to judicially ascertain and determine the common law duty? The common law as to such discrimination was superseded by the Hepburn Act. It must not be overlooked that, under the constitution of the state (Sec. 3, Art. 3, Genl. Stat. Kan., p. 46), the Supreme Court of the state is a court of limited and restricted jurisdiction, limited "to proceedings in *quo warranto*, *mandamus* and *habeas corpus*," and "such appellate jurisdiction as may be provided by law."

In the rendition of judgment against the railway company for damages to the Mill Company for a preference and discrimination prohibited by the Hepburn Act, it usurped a power which this Court has said (226 U. S. 433) it was "impotent" to assert; a power, no element of which has been left in the control of the state. (227 U. S. 249.)

Again, we submit if, as determined by the state court, three-fifths of the traffic to be transported was interstate, and the carrier was guilty of an unlawful preference and discrimination against the Mill Company, such disregard of duty on its part was a clear violation of the provisions of the Hepburn Act, for which Congress has prescribed and provided specific

remedies and penalties, and additional penalties cannot be inflicted by the state, through or by its legislative or judicial departments, for the laws of Congress made in pursuance of the Constitution of the United States are "the supreme law of the land."

In the case of *Gulf Ry. Co. v. Hepley*, 158 U. S. 104, it was said that:

"The question is not whether, in any particular case, operation may be given to both statutes, but whether their enforcement *may* expose to a conflict of duties. It is enough that the two statutes prescribe different rules. In such case, one must yield, and that one is the state law."

Leisy v. Harden, 135 U. S. 107-125.

If the Hepburn Act is the supreme law of the land, which no one will question, "the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

Sturges v. Crowninshield, 4 Wheat. 122.

Brown v. Maryland, 12 Wheat. 419.

Wilson v. Blackbird, 2 Pet. (U. S.) 245.

Cooley v. Board, 12 How. (U. S.) 299.

R. R. v. Fuller, 18 Wall. 568.

Welton v. State, 91 U. S. 281.

Henderson v. Mayor, etc., 92 U. S. 271.

Sherlock v. Alling, 93 U. S. 103.

R. R. Co. v. Husen, 95 U. S. 469.

Hall v. DeCuir, 95 U. S. 499.

Mobile v. Kimball, 102 U. S. 702.

Gloucester Ferry Co. v. Penn., 114 U. S. 204.

Brown v. Houston, 114 U. S. 632.

Walling v. Michigan, 116 U. S. 455.

Pickard v. Pullman Co., 117 U. S. 49.

Wabash v. Illinois, 118 U. S. 569-577.

Robbins v. Shelby, etc., 120 U. S. 494.

Fargo v. Mich., 121 U. S. 245-247.

Bowman v. Ry. Co., 125 U. S. 490.

Stoutenburgh v. Hennick, 129 U. S. 148.
Leisy v. Hardin, 135 U. S. 108.
McCall v. Cal., 136 U. S. 108.
In re Raher, 140 U. S. 555.
Brennan v. Titusvill, 153 U. S. 300-303.
Covington v. Kentucky, 154 U. S. 209-223.
Inter. Com. v. Brinson, 154 U. S. 470.
U. S. v. Knight, 156 U. S. 11-12.
Gulf Ry. v. Hopley, 158 U. S. 104.
Rhodes v. Iowa, 170 U. S. 412-425.
Scranton v. Wheeler, 179 U. S. 160.
R. R. Co. v. Eubanks, 184 U. S. 38-43.
Kelley v. Rhoads, 188 U. S. 5-10.
In re Lottery Case, 188 U. S. 358.
Stockyards v. Ry. Co., 192 U. S. 568.
Johnson v. S. P. Co., 196 U. S. 21-22.
McNeil v. South. Ry. Co., 202 U. S. 558.
T. & P. Ry. Co. v. Abilene, 204 U. S. 426.
Schemmer v. Ry. Co., 205 U. S. 1.
Armour Pkg. Co. v. U. S., 209 U. S. 78.
 (And many other kindred cases.)

In these decisions this Court has consistently held that the power of Congress "embraces within its control all instrumentalities by which that (interstate) commerce may be carried on, and the means by which it may be aided and encouraged"; that as to some of the powers "which are local and limited in their nature or sphere of operation, the states may prescribe regulations *until Congress intervenes and assumes control of them*"; that if Congress had passed any act which bore upon the case—any act in execution of the power to regulate commerce—the jurisdiction of the state was at an end; that whatever "Congress determined, either as a regulation or liability for its infringement, is exclusive of state authority."

We respectfully submit that the state court in rendering judgment against the Railway Company, penalizing it for failure to move interstate commerce, asserted a power which it did not possess.

B. P. WAGGENER,
Attorney for Plaintiff in Error.



19

Office Supreme Court, U. S.
FILED
DEC 12 1913
JAMES D. MAHER
CLERK

In the Supreme Court of the United States.

October Term, 1913.

No. 135.

THE MISSOURI PACIFIC RAILWAY COMPANY,
Plaintiff in Error,
vs.
THE LARABEE FLOUR MILLS COMPANY,
Defendant in Error.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

(To be considered with brief already
filed on the motion of defendant in
error to dismiss or affirm.)

JOSEPH G. WATERS,
CHARLES BLOOD SMITH,
JOHN C. WATERS,
JOHN F. SWITZER,
Attorneys for Defendant in Error.

SUBJECT INDEX.

Brief and Argument on the proposition that the Supreme
Court of Kansas had jurisdiction in rendering
judgment as it was rendered.

TABLE OF CASES.

(Cited in Brief on Motion to Dismiss.)

	Page
<i>Bucher v. Rd. Co.</i> , 125 U. S. 555.....	40
<i>Bacon v. Ins. Co.</i> , 131 U. S. 258.....	40
<i>Barton v. Mulvane</i> , 59 Kan. 313.....	45
<i>Booth v. Illinois</i> , 184 U. S. 425.....	37
<i>Bank v. Rd. Co.</i> , 163 U. S. 325.....	21
<i>Connolly v. Pipe Co.</i> , 184 U. S. 540.....	44
<i>Chadwick v. Kelly</i> , 187 U. S. 543.....	16
<i>Corry v. Campbell</i> , 154 U. S. 629.....	29
<i>Chafin v. Houseman</i> , 93 U. S. 130.....	24
<i>Cooley's Const. Law</i> , 572.....	37
<i>DeSaussure v. Gaillard</i> , 127 U. S. 216.....	14
<i>Davidson v. New Orleans</i> , 96 U. S. 97.....	29
<i>Dower v. Richards</i> , 151 U. S. 655.....	14
<i>Egan v. Hart</i> , 165 U. S. 188.....	46
<i>Eustis v. Bolles</i> , 150 U. S. 361.....	14
<i>Executor, etc. v. Quidnick Co.</i> , 135 U. S. 457.....	40
<i>Forsythe v. Hammond</i> , 166 U. S. 506.....	37
<i>Giles v. Little</i> , 134 U. S. 645.....	33
<i>Gibson v. Chouteau</i> , 8 Wall. 314.....	15
<i>Hunter v. Pittsburgh</i> , 207 U. S. 161.....	34
<i>Head v. Mfg. Co.</i> , 113 U. S. 9.....	29
<i>Hayes v. Missouri</i> , 120 U. S. 68.....	30
<i>Hale v. Lewis</i> , 185 U. S. 473.....	14
<i>Hale v. Akers</i> , 132 U. S. 554.....	15
<i>Hopkins v. McClure</i> , 133 U. S. 380.....	15
<i>Ins. Co. v. Warren</i> , 181 U. S. 73.....	31
<i>Kingsbury v. Rd. Co.</i> , 156 Mo. 379.....	19
<i>Life Assn. v. Yoakum</i> , 98 Fed. 251.....	18
<i>Larabee v. Mo. Pac. Ry. Co.</i> , 85 Kan. 214.....	20
<i>Land Co. v. Laidley</i> , 159 U. S. 103.....	29
<i>Life Assn. v. Mettler</i> , 185 U. S. 308.....	31
<i>Larabee v. Mo. Pac.</i> , 74 U. S. 822.....	7

	Page
<i>Maryland v. Hyman</i> , 98 Md. 597.....	16
<i>Munn v. Illinois</i> , 94 U. S. 113.....	17
<i>Murray v. Rd. Co.</i> , 62 Fed. 24.....	25
<i>Moore v. Missouri</i> , 159 U. S. 673.....	21
<i>Missouri v. Lewis</i> , 101 U. S. 23.....	21
<i>Mugler v. Kansas</i> , 123 U. S. 623.....	34
<i>Mo. Pac. v. Larabee</i> , 64 Kan. 284.....	25
<i>McClure v. Searles</i> , 60 Kan. 672.....	6
<i>Mining Co. v. Penn.</i> , 125 U. S. 185.....	35
<i>Manley v. Park</i> , 187 U. S. 547.....	15
<i>New Orleans v. Waterworks</i> , 142 U. S. 160.....	14
<i>Oregon v. Hitchcock</i> , 202 U. S. 60.....	34
<i>Olcott v. Supervisors</i> , 16 Wall 689.....	19
<i>Powell v. Peem</i> , 127 U. S. 678.....	37
<i>Plague Mines v. Henderson</i> , 170 U. S. 511.....	24
<i>Rd. Co. v. Coachman</i> , 59 Fla. 130.....	16
<i>Rd. Co. v. Iowa</i> , 160 U. S. 389.....	29
<i>Rd. Co. v. Kentucky</i> , 188 U. S. 503.....	16
<i>Rd. Co. v. Seegars</i> , 207 U. S. 73.....	19
<i>Rd. Co. v. Paul</i> , 173 U. S. 404.....	18
<i>Rd. Co. v. Ellis</i> , 165 U. S. 150.....	18
<i>Rd. Co. v. Rd. Co.</i> , 14 Wall. 23.....	15
<i>Rd. Co. v. Illinois</i> , 200 U. S. 561.....	17
<i>Rd. Co. v. Ohio</i> , 173 U. S. 285.....	17
<i>Rd. Co. v. Matthews</i> , 174 U. S. 96.....	17
<i>Rd. Co. v. Haines</i> , 115 U. S. 512.....	17
<i>Soon Hing v. Crowley</i> , 113 U. S. 709.....	30
<i>Striker v. Goodnow</i> , 123 U. S. 527.....	33
<i>Smalley v. Yates</i> , 36 U. S. 709.....	20
<i>Sharpless v. Buckles</i> , 65 U. S. 838.....	21
<i>Shelby v. Guy</i> , 11 Wheat. 361.....	40
<i>Tel. Co. v. Pub. Co.</i> , 181 U. S. 92.....	25
<i>Wilson v. North Carolina</i> , 169 U. S. 586.....	37
<i>Wade v. Lawder</i> , 165 U. S. 624.....	14
<i>Walston v. Nevins</i> , 128 U. S. 578.....	30
<i>Walker v. Sauvinet</i> , 92 U. S. 90.....	29
<i>Waters-Pierce Co. v. Texas</i> , 177 U. S. 28.....	31
<i>Welch v. Swansen</i> , 214 U. S. 91.....	37

of the United States.

No. 135.

VB.

COUNSEL for defendant in error were served on the eighth day of this month with a supplemental brief by the counsel for plaintiff in error, which is but an elaboration of their argument heretofore made in this court, on one proposi-

tion, that the State court was without jurisdiction to render any judgment and especially without jurisdiction to render certain damages therein. We have attempted to answer this in a brief and argument already filed herein on the motion of the defendant in error to dismiss or affirm, and which, extending to the entire controversy made by the other side, we respectfully request may be considered by the court as part and parcel of this.

We desire to say in reply to the supplemental brief, that it is an attempt to reargue and have reheard the decision of this court in this case made four years ago, in which decision the judgment of the Supreme Court of Kansas was affirmed on the exact proposition again contended for in their supplemental brief.

In the case as heretofore decided and affirmed by this court, the judgment of the State Supreme court beside awarding the peremptory writ of mandamus, also awarded judgment for damages and costs.

They now make claim that the judgment for damages and costs was error. The writ of error pursued by them in this case cannot be availed to obtain a rehearing of the case already deter-

mined, and while they have in their supplemental brief given an elaborate list of authorities which would have been proper to have been presented on the former hearing, they cannot, we suggest, be of avail for any purpose in this argument.

In after proceedings had in the Supreme Court of Kansas, damages were allowed the defendant in error, and it is this allowance of damages that is their main or sole contention here; and, taking into consideration all the voluminous briefs filed by them, it does not seem to us that they can extend the present controversy beyond this bound. It is contended that the State court was guilty of penalizing interstate commerce, which we do not think possible, on what appears on the face of the transaction. The Railway Company disregarded and would not perform its duty under the law and the State court compelled it to do so by the writ of mandamus, and in obedience to a course of procedure long established in the State, as a consequence of such disobedience, damages and costs were allowed; and it might as well have been contended that the issue of the writ itself compelling it to perform its duty was fully as much of a penalizing process as

to make it pay damages or costs. If any part of the decision of the State court can be attacked by them as the infliction of a penalty, handicapping interstate commerce, then the ordinary costs of the suit for any purpose, the allowance of damages for the disregard of the law and consequent injury to the business of the Mill Company, and the issue and service of the writ, all these elements are exactly on the same plane, one as much as the other, for they are, each of them, exactions made by the State under the law of the State. We are so far fortified in our position, after an extended argument by the distinguished counsel for the Railway Company, that this court decided in this case in its former hearing, that the State court did have the right to compel the railway to perform this public duty, and affirmed the issuance of that writ.

This court has recently in the Minnesota Rate case, 230 U. S. 410, reaffirmed its decision in 211 U. S. 612, referred to, by saying:

“And the legislation of the states safeguarding life and property and promoting comfort and convenience within its jurisdiction, may extend incidentally to the operations of the carrier in the conduct of interstate business provided it

does not subject that business to unreasonable demands, and is not opposed to Federal legislation."

citing a large number of cases, including that of the *Missouri Pacific Railway Company v. Larabee Mills Company*, 211 U. S. 612.

The statute of Kansas in this kind of a case, directs that the successful party may have a recovery for the injury sustained by reason of the illegal refusal of the defeated party to perform its public duty.

This provision for damages is not attempted to be covered by any act of Congress, and it ought not be to the prejudice of the party injured that the defeated party under the forms of law prosecutes a writ of error here and is sent back without relief.

The Mill Company sustained a loss, direct and certain, in this pursuit of its right and the State court has declared under the State law it is a legitimate and lawful claim.

Section 5193, of General Statutes of Kansas, 1901, as construed by the Supreme Court of that State, is not in conflict with the Fourteenth Amendment of the Constitution of the United States.

It is contended by counsel for plaintiff in error that Section 5193, of the General Statutes

of Kansas, 1901, as construed by the Supreme Court of the State of Kansas, is unconstitutional and void, and in conflict with the Fourteenth Amendment of the Constitution of the United States.

For many years the provisions of such statute have been enforced in the State of Kansas, both against private and municipal corporations, as well as against public officials, and the construction placed upon the provisions of the statute by the Supreme Court of the State in *McClure v. Scates* upheld.

The Supreme Court of Kansas, in the recent case of *Nolte v. Telephone Company*, 86 Kan. 773, has again reaffirmed its former construction placed upon this section, and says:

"Section 723 of the civil code is cited as the only authority for rendering a judgment for the recovery of damages in an action of mandamus. It reads:

"'If judgment be given for the plaintiff, he shall recover the damages which he shall have sustained, to be ascertained by the court or jury, or by referees, as in a civil action, and costs; and a peremptory mandamus shall also be granted to him without delay.'

"The only question is whether the defendant in such an action can defeat the plaintiff's right to recover the damages he has theretofore suf-

ferred by complying with the demand after the action is brought and before the time set for the hearing for the peremptory writ. The appellant concedes that the court in its discretion could tax the costs of the proceeding to the appellant. In *McClure v. Scates*, 64 Kan. 282; 67 Pac. 856, it was decided that the plaintiff in such an action may, 'in the same proceeding and as a part of his remedy, recover such damages as he has actually sustained through the wrong-doing of the defendants.' (Syl. No. 1.) Also that the attorneys' fees and other expenses necessarily incurred are included in such damages. (See, also, *Larabee v. Railway Co.*, 85 Kan. 214; 116 Pac. 901.) Indeed, it is quite customary in original actions of mandamus in this court to allow the petitioner, if successful, to recover attorneys' fees and other expenses as damages. This does not usually appear in the opinions filed for the reason that such allowances are made, after the decisions are filed, upon motion.

"It is true that judgment was not rendered in favor of the appellee for one part of the remedy to which she was entitled for the reason before stated. But the findings were in favor of the appellee, and there is the same authority under the section quoted for the court to ascertain and render judgment for the damages sustained as there is for assessing the costs against the appellant, and it would appear to be a travesty on justice that the defendant in an action could satisfy part of the remedy to which the

plaintiff was entitled and thereby prevent the recovery of another part."

However, counsel for the plaintiff in error says that such a construction placed upon the statute when applied to the Missouri Pacific Railroad denies that company the equal protection of the law.

If either the statute itself or the construction placed upon it by the Supreme Court of the State applied only to the Missouri Pacific Railway Company, or signaled out railroad companies alone, there might be merit in such contention.

The construction, however, placed upon the section by the Supreme Court applies alike to all corporations, individuals, or public officials, who refrain from performing a duty enjoined upon them by law. The counsel for the plaintiff in error has placed upon their brief many authorities from various states holding that attorneys' fees are not recoverable as an element of damage. We concede that in many states such is the law, but there are other states, of which Kansas is one, where the legislature and courts have adopted a different view and permitted the recovery of attorneys' fees as an

element of damage in mandamus proceedings. It can scarcely be contended that such a public policy adopted by a State is not within the power of the State or its legislature.

We, therefore, confidently submit that Section 5193, of the General Statutes of Kansas, 1901, as construed by the Supreme Court of Kansas, is not in conflict with the Fourteenth Amendment of the Constitution of the United States, but is in all respects a valid statute.

The Supreme Court of the State of Kansas was not deprived of all power to award damages by reason of the provisions of Section 1010 of the Judiciary Act.

It is, however, contended that the Judiciary Act of Congress (Sections 999, 1000, 1003 and 1010), Compiled Statutes of the United States, 1901, Vol. 1, deprived the Supreme Court of Kansas of jurisdiction to assess damages against the defendant, alleged to have accrued after the Supreme Court of Kansas had awarded the peremptory writ of mandamus to the defendant in error.

It will be observed that the peremptory writ was allowed on the 8th day of December, 1906. (Rec. p. 100.) On the 24th day of December, 1906, a writ of error was granted to the Su-

preme Court of Kansas, conditioned upon giving a supersedeas bond in the sum of \$20,000.00.

It is asserted that by the provision of Section 1010 of the Judiciary Act, which is as follows:

“Where, upon a writ of error judgment is affirmed in the supreme court or circuit court, the court shall adjudge to the respondent in error just damages for his delay, and single or double costs, at its direction.”

that the State court was deprived of all power to award damages under the provisions of the State statute.

It is urged that by the giving of the supersedeas bond the Supreme court of the State was deprived of all power to entertain a claim for damages after its decision had been affirmed by this court.

At the time the writ of error was allowed, the Supreme Court of the State refrained from any further proceedings to ascertain the damage that the Mill Company had suffered by a reason of the wrongful act of the Railway Company. There had been no award in favor of the Mill Company for damages, nor in fact had issues been joined upon the claim of the Mill Company for such damages at the time the supersedeas bond was given and the writ of error allowed

The case was argued and submitted to this court upon the sole question of the power of the State court to award the peremptory writ in the first instance, for reasons disclosed in the record. The question of the amount of damages was not before this court in any respect and was not involved in the proceedings pending in this court.

It would be a more remarkable situation, if the defendant in error here can be deprived of the benefit of the State statute, referred to, by the mere prosecution of a writ of error to this court and the giving of a bond in connection therewith, although upon the hearing of said proceedings the judgment of the State court in awarding the peremptory writ was affirmed.

The defendant in error in this case was not awarded damages for the delay in obtaining the writ, but was awarded just damages in enforcing its rights against the Railroad Company, which it had actually sustained through the wrong-doing of the company.

When the proceedings in error were perfected and the supersedeas allowed, the effect was to remove the record into this court, and the jurisdiction of the Supreme Court of the State

was suspended until the cause again was remanded from this court to the Supreme Court of the State.

After the decision of the Supreme Court of the State had been affirmed by this court that court had full and complete jurisdiction to proceed under the provisions of the State statute, and award damages in conformity with such provision. The effect of the proceedings in error was not to deprive the State court of its right to again assume jurisdiction of the matter pending before it which had been suspended by the writ of error. This seems to us too plain for argument.

The rights of the defendant in error are bottomed entirely upon the provisions of the State statute referred to.

The case of *Tullock v. Mulvane* and the other authorities referred to by counsel for the plaintiff in error have, in our judgment, no bearing upon the question involved, as our rights are derived solely from a State statute which we contend is constitutional and sustains the jurisdiction of the Supreme Court of the State in awarding the damages recovered.

In conclusion, we beg to suggest that the de-

cision of this court in the case of the *Missouri Pacific Railway Company v. Larabee Mills Company*, 211 U. S. 612, is still the law of this case, notwithstanding the very able argument presented by the counsel for the plaintiff in error in his attempt to reargue the question decided in that case, and in which the jurisdiction of the Supreme Court of the State is sustained in awarding the peremptory writ of mandamus against the plaintiff in error.

1. That the State of Kansas has full power over remedies and procedure in its own courts.

2. That the State statutes in controversy is not invalidated by any of the provisions of the Fourteenth Amendment to the Constitution of the United States.

3. That the provisions of Section 5193, of the General Statutes of Kansas, 1901, as construed by the highest court of that State, do not violate the provisions in the Fourteenth Amendment to the Constitution of the United States, which forbids a State to deprive any person of life, liberty or property without due process of law.

4. That the amount of damages assessed by the Supreme Court of Kansas under its con-

struction of the State law is final and not reviewable by this court.

That, by reason thereof, the writ of error in this case should be dismissed or the judgment of the Supreme Court of the State of Kansas be affirmed.

All of which is respectfully submitted.

JOSEPH G. WATERS,

CHARLES BLOOD SMITH,

JOHN C. WATERS,

JOHN F. SWITZER,

Attorneys for Defendant in Error. 69

